SYMPOSIUM ON ENVIRONMENTAL LAW

COMMON-LAW REMEDIES FOR ENVIRONMENTAL WRONGS: THE ROLE OF PRIVATE NUISANCE
Ronald J. Rychlak

LIABILITY INSURANCE COVERAGE FOR POLLUTION CLAIMS
Eugene R. Anderson, Joy Lambert Phillips, Natalia Kisseleff

1989 SUPREME COURT REVIEW

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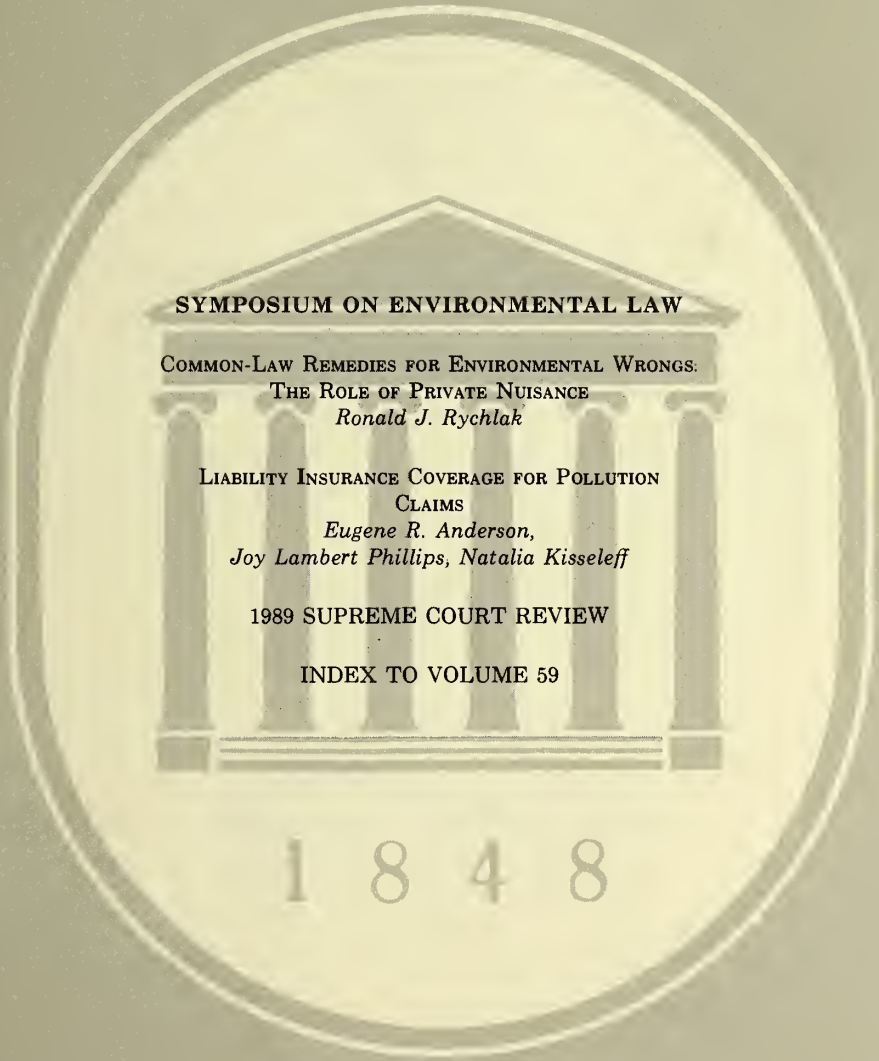

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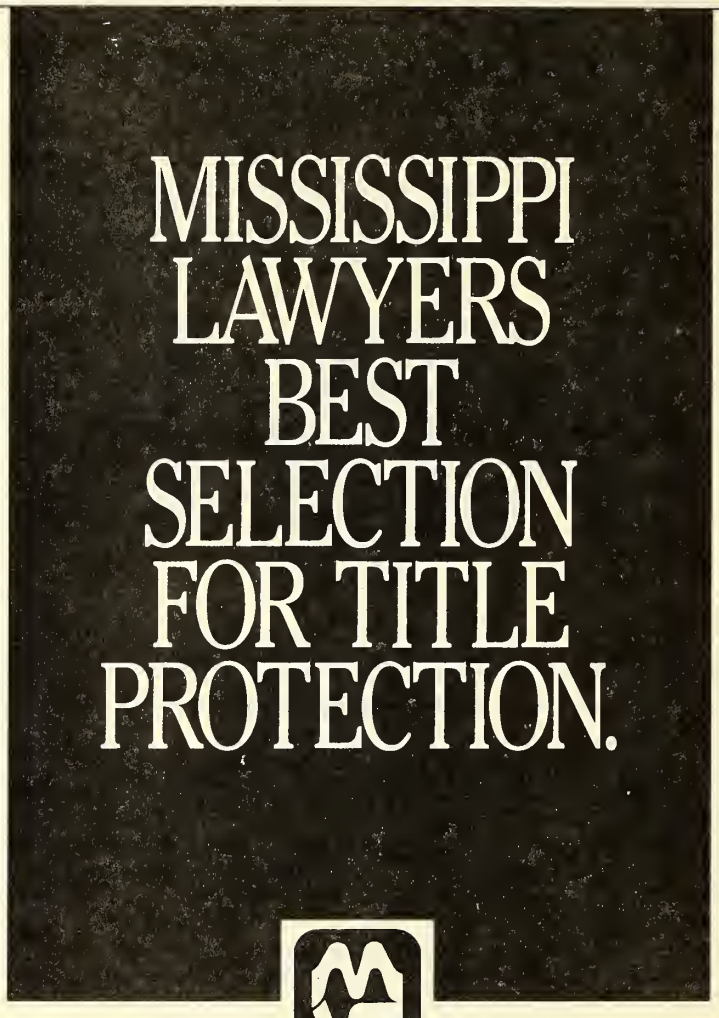

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Current subscription: $25.00 per year. Single issue: $8.50. Subscriptions are renewed automatically upon expiration unless the subscriber sends notice of termination. For information about subscriptions, please call (601)232-7361, Extension 111.

POSTMASTER: Send address changes directly to *Mississippi Law Journal*, Law Center, University Circle, Room 111, P.O. Box 849, University, Mississippi 38677-0849. Include name, new address (including zip code), and old address. Please notify 45 days in advance to ensure prompt delivery.

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Second class postage paid at University, Mississippi 38677-0849 and additional mailing offices.

Citations conform to A Uniform System of Citation (14th ed. 1986).

The *Mississippi Law Journal* is a member of the National Conference of Law Reviews.

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Mississippi Law Journal

Published by Students at the University of Mississippi School of Law

VOLUME 59 WINTER 1989 NUMBER 3

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SYMPOSIUM ON ENVIRONMENTAL LAW

FOREWORD

A little more than twenty years ago, Denis Hayes, on leave from Harvard Law School, conceived of and brought to fruition an event known as Earth Day. On that day in 1970, more than twenty million people participated in what became the catalyst for the environmental movement in the United States and abroad. The first Earth Day sparked the creation of the Environmental Protection Agency and paved the way for significant revisions to the Clean Water Act. Over the following years new legislation designed to protect the environment became a staple of American politics with the enactment of the Resource Conservation and Recovery Act, the Toxic Substances Control Act, and the Comprehensive Environmental Response, Compensation and Liability Act, to name a few. On April 22 of 1990, on the eve of significant amendments to the Clean Air Act, more than 200 million people from 135 countries celebrated the twentieth anniversary of Earth Day. Despite the apparent successes witnessed over the previous two decades, the original founder of Earth Day was to proclaim that "the world is in worse shape today than it was 20 years ago. Environmental threats now vie with nuclear war as the pre-eminent peril to our species."

While this symposium alone cannot hope to reduce the impact of the many threats on our environment, we have endeavored to provide the legal practitioner with the tools necessary to

operate in the coming decade. Two trends make the role of the legal practitioner more important in the area of environmental management than in the past. First, the recent increase in public environmental awareness, partly evidenced by the Earth Day festivities, will inevitably lead to new and tougher environmental laws and more strict enforcement. Second, our less than stellar past in environmental protection, particularly in Mississippi, will require stronger efforts to comply with the tightening standards. To illustrate the second point, a recent study conducted by the Institute for Southern Studies ranking the states on thirty-five indicators of pollution, public health, workplace safety, and environmental policy, ranked Mississippi forty-ninth out of the fifty.

It is in this climate that the legal practitioner will be called upon to guide his or her client through a myriad of environmental regulations and requirements.

Because of the length of this symposium and the continuing importance of its issues, it will be continued in the next edition of the *Mississippi Law Journal*. This installment begins with an article written by Ronald Rychlak, which discusses the common law nuisance claim as an integral component to the environmental law suit. The second article, written by Eugene R. Anderson, Joy Lambert Phillips, and Natalia Kisseleff, tackles the problem of insurance coverage of pollution claims and presents the argument that pollution is a covered event under a comprehensive general liability policy. Two student works complete the symposium in this issue. The first deals with the specific problem of stream rechannelization and the necessity of a new environmental impact statement, while the second discusses a recent decision by the United States Supreme Court, *Pennsylvania v. Union Gas Co.*, which for the first time declared states to be liable for CERCLA response costs.

These articles are presented in order to assist the Mississippi practitioner in providing competent advice in environmental law. But more than that, it is hoped that with the focus of

the symposium on this explosive new field of law, the readership will feel the tide shift and be prepared for what many have called the decade of the environment.

Walter H. Boone
Symposium Editor

COMMON-LAW REMEDIES FOR ENVIRONMENTAL WRONGS: THE ROLE OF PRIVATE NUISANCE

*Ronald J. Rychlak**

I. Introduction

Today's environmental plaintiff has a myriad of federal statutes upon which to base a claim against a polluter.[1] In many cases, however, common-law actions, such as nuisance, negligence, trespass, and strict liability for abnormally dangerous activities, still provide attractive features. This paper attempts to illustrate those features by focusing on the common-law doctrine of private nuisance. What is its place in today's environmental litigation? To what extent, if any, has it been preempted by federal legislation? What are its potential pitfalls and problems? How receptive have Mississippi courts been to such claims? This paper attempts to answer these questions and provide guidance to the environmental litigator interested in attaining favorable results without extensive reliance upon federal legislation.

II. The Definition of Nuisance

Since virtually the dawn of common law, there has been a cause of action designed to cover invasions of property due to conduct wholly outside of that property.[2] Originally, this cause

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* Associate Professor of Law, University of Mississippi. The author would like to thank the University and the Lamar Order for providing funding to support this research. The author has consulted with the plaintiffs in the following cases, which contain some issues similar to those discussed in this article: Cooper v. Armstrong Rubber Co., No. J88-0464(L) (S.D. Miss.); Berry v. Armstrong Rubber Co., No. J88-0653(B) (S.D. Miss.).

[1] Section 505 of the Clean Water Act, 33 U.S.C. § 1365 (1982), section 7002 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (1982 & Supp. II 1984), and section 304 of the Clean Air Act, 42 U.S.C. § 7604 (1982), all expressly authorize citizen suits for injunctive relief to compel compliance with the respective Acts.

[2] W. Prosser & W. Keeton, The Law of Torts 617-18 (5th ed. 1984).

of action may have had criminal as well as civil components.[3] It evolved into what is today known as the tort of private nuisance. Nuisance is defined as:

> [T]hat class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his improper, indecent, or unlawful personal conduct, working an obstruction or injury to a right of another, or of the public and producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage.[4]

A public nuisance[5] may be described as an unreasonable interference with the right of, or a threat to, the general public,[6] such as a club where liquor is illegally served,[7] or a deep and dangerous hole in the shallow area of a lake used for swimming.[8] Public nuisances are often defined by statute.[9] A public nuisance action

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[3] *See* Halper, *Public Nuisance and Public Plaintiffs: Rediscovering the Common Law* (pt. I), 16 ENVTL. L. REP. (ENVTL. L. INST.) 10292, 10294 (1986) (discussing origin of tort of public nuisance and its criminal nature).

[4] Young v. Weaver, 202 Miss. 291, 299-300, 32 So. 2d 202, 205 (1947) (quoting 46 C.J. *Nuisances* § 1 (1928)).

[5] There is a great deal of confusion between public and private nuisance. Halper, *supra* note 3, at 10294. This results from the overlap of these two doctrines in some areas, and their divergence in other areas. *See* Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 411 (1942) (stating that the common name given to public and private nuisance is "in the highest degree unfortunate"). Although this paper's primary focus is on private nuisance, when the two doctrines are treated in a similar way, this paper sometimes illustrates points with public nuisance cases.

[6] F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A.03, at 4A-199 (1988). A public nuisance may also be defined as "an unreasonable interference with a right common to the general public." RESTATEMENT (SECOND) OF TORTS § 821B (1979). For a detailed explanation of the distinction between public and private nuisance actions, see Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966).

[7] *See, e.g.*, Proby v. State *ex rel.* West, 498 So. 2d 792, 795 (Miss. 1986) (club which illegally served liquor constituted public nuisance).

[8] *See* Price v. United States, 530 F. Supp. 1010, 1016 (S.D. Miss. 1981) (discussing Schumacher v. Carl G. Neumann Dredging & Improvement Co., 206 Wis. 220, 239 N.W. 459, 460 (1931)).

[9] *See, e.g.*, MISS. CODE ANN. § 95-3-1 (Supp. 1989) (nuisance defined as place where lewdness, assignation, or prostitution takes place or where controlled substances are found); MISS. CODE ANN. § 95-3-25 (1972) (places where gambling devices are kept shall be deemed common nuisance); MISS. CODE ANN. § 99-27-23 (1972) (clubs or boats where liquor is found shall be deemed common nuisance). Mississippi's statutory scheme provides certain rules of procedure and evidence. MISS. CODE ANN. § 95-3-1 to -29 (1972 &

is usually brought by a governmental entity as a civil action,[10] but the nuisance is an offense against the state and may be criminally prosecuted;[11] and in some cases the cause of action may even be pursued by a private plaintiff.[12] The sovereign's

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Supp. 1989). These sections were, however, intended to supplement rather than replace common-law rules. *Proby*, 498 So. 2d at 795. Since the Mississippi code sections are directed against specific types of nuisances, their provisions may be inapplicable to common-law nuisances. *Id.* at 795; *see* MISS. CODE ANN. § 95-3-1 (Supp. 1989) (nuisance defined as place where lewdness, assignation, or prostitution takes place or where controlled substances are found). In *Proby*, the court held that provisions relating to houses of prostitution were inapplicable to a common-law nuisance claim made against a lounge. *Proby*, 498 So. 2d at 795.

[10] In Mississippi, municipalities have statutory authority to abate nuisances. MISS. CODE ANN. § 21-19-1 (1972). Additionally, when the state board of health becomes aware of something which is injurious to the public health, it may declare a nuisance and notify the district attorney in the relevant county "who shall forthwith commence proceedings" for abatement. MISS. CODE ANN. § 41-23-13 (1972).

[11] Many states have criminal nuisance statutes. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-2908, 13-2917 (1956) (establishing certain types of nuisances as crimes); N.Y. [PENAL] LAW § 240.45 (McKinney 1989) (same). Other states provide for non-criminal statutory nuisance actions. *See, e.g.*, IND. CODE ANN. § 34-1-52-1 (Burns 1976) (providing authority for civil nuisance causes of actions); OHIO REV. CODE ANN. § 3767.01 -.99 (Anderson 1953) (same). Mississippi's statutes have criminal aspects. *See, e.g.*, MISS. CODE ANN. § 99-27-23 (1972) (providing that clubs, boats, places where liquor found may be abated as nuisance in suit brought by attorney for state who is charged with prosecuting criminal actions); MISS. CODE ANN. § 95-3-25 (1972) (providing similar rule for places where gambling devices are kept); *see also* New York v. Shore Realty Corp., 759 F.2d 1032, 1050 (2d Cir. 1985) (public nuisance is offense against state and involves interference with rights common to all); Halper, *supra* note 3, at 10294 (discussing criminal nature of nuisance). Whether criminal prosecutions for public nuisances remain a viable alternative is, however, subject to debate. *See* W. RODGERS, ENVIRONMENTAL LAW 104 (1977) (stating that "we are unlikely if ever to see another conviction for the common law crime of public nuisance (and still more unlikely to see it sustained on appeal against constitutional attack)").

[12] The traditional rule is that a private litigant can sue for damages based upon a public nuisance only when his or her injury differs in kind from those suffered by the public at large. Maples v. Quinn, 217 Miss. 567, 570, 64 So. 2d 711, 712 (1953) (quoting W. BLACKSTONE COMMENTARIES 822); F. GRAD, *supra* note 6, § 4A.03, at 4A-199. However, this requirement has come under attack as a "relic" and has not been strictly enforced in more recent cases. W. RODGERS, *supra* note 11, at 104-06. The modern trend is to eliminate the distinction between public and private nuisance in this area and to allow private individuals to institute legal actions whether the nuisance is private or public. Prosser, *supra* note 6, at 1004-06. In Mississippi, any person who is a citizen of the county in which the nuisance is located is statutorily authorized to bring suit to abate the nuisance. *See* MISS. CODE ANN. § 95-3-5 (1972) (granting statutory authority to bring civil nuisance suit); *see also* Perry v. Jones, 43 So. 2d 565, 565 (1949) (plaintiff who needed alley for access to his property entitled to seek relief from public nuisance which blocked it off).

suit is governed by strict liability because it is an exercise of police power.[13] However, when a private litigant alleges a public nuisance, the plaintiff may have to establish negligence by the defendant.[14]

A private nuisance, by contrast, is an unreasonable interference with the plaintiff's enjoyment of his property,[15] such as the case where a farm creates offensive odors that drift over to the neighbor's property.[16] An action for private nuisance is the typical common-law approach for an individual litigant to remedy an environmental wrong causing him harm. Noise pollution is the most common form of environmental nuisance,[17] but nuisance may also be caused by dust, smoke, vibrations,[18] odors,[19]

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[13] Halper, *supra* note 3, at 10296-97; *see, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1051 (2d Cir. 1985) (defendant "is liable for maintenance of *public* nuisance irrespective of negligence or fault"); Commonwealth v. Barnes & Tucker Co., 23 Pa. Commw. 496, 509, 353 A.2d 471, 478 (1976) (concept of negligence irrelevant to public plaintiff's suit to abate public nuisance), *aff'd*, 472 Pa. 115, 371 A.2d 461, *appeal dismissed*, 434 U.S. 807 (1977).

[14] Halper, *supra* note 3, at 10294.

[15] F. GRAD, *supra* note 6, § 4A.03, at 4A-197, *see* Halper, *Public Nuisance and Public Plaintiffs: Ownership, Use and Causation* (pt. II), 17 ENVTL. L. REP. (ENVTL. L. INST.) 10044, 10048 (1987) (stating that "[r]ights in land are . . . the underpinnings of private, but not public, nuisance"). "A private nuisance is narrowly restricted to the invasion of interests in the use and enjoyment of land. It is only a tort, and the remedy for it lies exclusively with the individual whose rights have been disturbed." *Id.* (quoting Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 999 (1966)).

[16] *See* Rust v. Guinn, 429 N.E.2d 299, 300 (Ind. App. 1982) (suit filed for nuisance due to smell of defendant's chicken farm).

[17] J. ARBUCKLE, M. MILLER, T. SULLIVAN, T. WATSON, ENVIRONMENTAL LAW HANDBOOK, § 6.1.2, at 11-12 (6th ed. 1979) [hereinafter ENVIRONMENTAL LAW HANDBOOK]. In order for noise pollution to be actionable, it must be more than annoying. Tortorella v. H. Traiser & Co., 284 Mass. 497, 188 N.E. 254, 256 (1933). The noise must be of such magnitude and intensity as to cause physical or psychological discomfort and annoyance to persons of ordinary sensibilities. O'Neil v. Carolina Freight Carriers Corp., 156 Conn. 613, 244 A.2d 372, 374 (1968) (noise from adjacent business caused loss of sleep and interfered with enjoyment of plaintiff's home); Jenner v. Collins, 52 So. 2d 638, 640 (Miss. 1951) (concerning drive-in theater noise). Whether noise constitutes a nuisance is normally a question of fact. *Id.*

[18] *See, e.g.*, King v. Vicksburg R.R. & Light Co., 88 Miss. 456, 457, 42 So. 204, 204 (1906) (suit based on depreciation in value of land due to noise, smoke, soot, cinders, and vibrations).

[19] *See* Mulroy & Rychlak, *Use of Real and Demonstrative Evidence at Trial*, 30 TRIAL LAW. J. 550, 551 (1990) (discussing Rust v. Guinn, 429 N.E.2d 299 (Ind. App. 1982), in which the plaintiff used a jar of chicken manure to explain the smell of defendant's chicken farm to the jury); *see also* Alfred Jacobshagen Co. v. Dockery, 139 So. 2d

or an infinite variety of other pollutants, including toxins,[20] which are carried to the plaintiff's property in the air, land, or water.[21]

III. The Advantages of Nuisance in Environmental Litigation

Despite several recent legislatively enacted causes of action,[22] common-law private nuisance is the "oldest and perhaps most useful legal theory" for environmental plaintiffs.[23] Often the environmental plaintiff is an individual or a small group, and the defendant is a large corporate entity. The resultant imbalance of resources may make for a difficult uphill battle if the plaintiff's legal theory is based on expensive scientific evaluations. Thus, many of the regulatory or statutory actions provided in environmental legislation are not favorable theories for a plaintiff. Instead, if the plaintiff can structure the suit to allege generally "that the pollution . . . 'looks bad, smells bad, and does bad things' . . . without getting mired in the scientific underpinnings — [the plaintiff] will be in the strongest position."[24] As one commentator has noted, "[t]he beauty of the simple nuisance or trespass case is that it reduces the case to terms a lay person can understand: 'You dumped it, it hurt me or my prop-

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632, 632-33 (Miss. 1962) (odor from animal rendering plant); City of Oxford v. Spears, 87 So. 2d 914, 915 (Miss. 1956) (odors from raw sewage dumped into water); Laurel Equip. Co. v. Mathews, 218 Miss. 718, 720, 67 So. 2d 258, 259 (1953) (odor from paint); Town of Mount Pleasant v. Van Tassell, 7 Misc. 2d 643, 166 N.Y.S.2d 458, 462-63 (Sup. Ct. 1957) (odor, unsightliness, and attraction of pests from "piggery" found to be public nuisance), *aff'd*, 6 A.D.2d 880, 177 N.Y.S.2d 1010 (App. Div. 1958).

[20] *See, e.g.*, Wood v. Picillo, 443 A.2d 1244, 1247 (R.I. 1982) (chemicals seeping into water table constituted both public and private nuisance).

[21] In one of the more unusual nuisance suits, the plaintiffs sought to enjoin completion of the 110-story Sears Tower in Chicago, on the grounds that it would distort television reception in surrounding areas. People *ex rel.* Hoogasian v. Sears, Roebuck & Co., 52 Ill. 2d 301, 287 N.E.2d 677, 677 (1972).

[22] *See, e.g.*, Clean Water Act § 505, 33 U.S.C. § 1365 (1982); Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972 (1982 & Supp. 1984) (same); Clean Air Act § 304, 42 U.S.C. § 7604 (1982) (authorizing citizen suits to compel compliance).

[23] Langrock, *Class Action Litigation*, 25 Trial, Oct. 1989, at 47. Mr. Langrock was plaintiff's counsel in the environmental class actions in Zahn v. International Paper Co., 414 U.S. 291 (1973), and Ouellette v. International Paper Co., 479 U.S. 481 (1987).

[24] Langrock, *supra* note 23.

erty, and you should pay.' "[25]

Common-law actions are sometimes available when statutory actions are unavailable. For instance, statutory actions would be barred if the defendant were in compliance with applicable regulations or statutes. Nuisance actions, however, may be available in such cases.[26] Holding a permit for operation of the alleged nuisance does not, as a matter of law, constitute a defense to a nuisance suit.[27] Thus it has been held that a permit granted under the Clean Water Act will not shield the defendant from a common-law nuisance suit.[28] Similarly, compliance with zoning laws will not shield the defendant from a nuisance suit.[29] Additionally, a nuisance claim may still be available after a statutory remedy is time barred[30] or unavailable to the plaintiff.[31]

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[25] *Id.* at 48.

[26] *See, e.g.*, Kirk v. McTyeire, 209 Ala. 125, 95 So. 361, 362 (1923) (involved municipal disposal facility); City of Selma v. Jones, 202 Ala. 82, 79 So. 476, 477-78 (1918) (same); Wilson v. City of Portland, 58 P.2d 257, 259-60 (Ore. 1936) (same).

[27] Heinl v. Pecher, 330 Pa. 232, 198 A. 797, 800 (1938). Although it is well established that a permit, or compliance with regulations, will not shield the defendant from an action for a private nuisance, whether the same can be said as to public nuisance suits is somewhat unclear. *See* F. GRAD, *supra* note 6, § 4A.03, at 4A-200 (compliance with regulations may be defense to public nuisance suit). *But see* Town of Mount Pleasant v. Van Tassell, 7 Misc. 2d 643, 166 N.Y.S.2d 458, 463 (Sup. Ct. 1957), (operation of piggery found to be public nuisance despite legality of operation), *aff'd*, 6 A.D.2d 880, 177 N.Y.S.2d 1010 (App. Div. 1958).

[28] This was the case in the *City of Milwaukee* litigation. *See infra* notes 47-71 and accompanying text; *see also* Note, *Environmental Law: States May No Longer Bring a Federal Common Law Nuisance Action To Abate Interstate Water Pollution*, 7 U. DAYTON L. REV. 511, 528 (1982) (stating that "[b]ecause Milwaukee was complying with the requirements of its permit, the enforcement mechanisms of the FWPCAA could not be commenced in order to provide immediate relief to Illinois").

[29] State v. Waterloo Stock Car Raceway, 96 Misc. 350, 409 N.Y.S.2d 40, 45 (Sup. Ct. 1978).

[30] A five-year statute of limitations applies to the Clean Water Act. Atlantic States Legal Found. v. Al Tech Specialty Steel Corp., 635 F. Supp. 284, 287 (N.D.N.Y. 1986). A nuisance action, however, would not necessarily be constrained by the same strict time limits. *See* National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1226-28 (3d Cir. 1980) (holding that federal common-law nuisance claim was still available though action under Clean Water Act was time barred), *rev'd sub nom.* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).

[31] *See* Gwaltney v. Chesapeak Bay Found., 484 U.S. 49, 64 (1987) (Clean Water Act does not grant jurisdiction to district court for wholly past violations); Ascon Properties, Inc. v. Mobile Oil Co., 866 F.2d 1149, 1159 (1989) (Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(A) (1982), does not grant jurisdiction to district court for wholly past violations); *see also infra* notes 242-44 and accompanying text.

Among the advantages of the nuisance suit is the potential for avoiding much of the delay inherent in statutory suits. Many environmental statutes have certain notice requirements which delay commencement of the suit.[32] In addition, unfamiliar legislation will lead to delays as counsel, judge, and jurors grapple with the statutory scheme. The more familiar nuisance doctrine may lead to a quicker resolution of the problem underlying the lawsuit. The timing in environmental litigation is often crucial; thus a nuisance suit, which provides for a quicker remedy, may be the plaintiff's best alternative. The remedy in a common-law nuisance action can also be more attractive to an environmental plaintiff, because such claims can provide injunctive and monetary relief to the successful plaintiff,[33] while many statutory actions provide only an injunctive remedy.[34] Finally, a careful plaintiff's attorney will evaluate the advantages and disadvantages of proceeding in state or federal court. If state courts provide a more favorable forum, then a common-law claim based on state law may be easier to keep there. If federal courts are more attractive, nuisance counts may be litigated there under diversity or pendent jurisdiction.[35]

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[32] *See, e.g.*, 42 U.S.C. § 6972(b)(1) (1983) (Solid Waste Disposal Act's 60-day notice requirement); 42 U.S.C. § 7604(b)(1)(A) (1983) (Clean Air Act's 60-day notice requirement). The Supreme Court recently held that the 60-day notice requirement contained in the Resource Conservation and Recovery Act is to be strictly construed. Hallstrom v. Tillamook, 110 S. Ct. 304, 308-11 (1989). If the plaintiff has failed to comply with the notice requirements, the case must be dismissed, but the plaintiff may refile after giving proper notice. *Id.* at 311-12.

[33] F. GRAD, *supra* note 6, § 4A.03, at 4A-197. Mississippi law is clear on the point that monetary damages are appropriate when a landowner's property has been impaired. *See* Masonite Corp. v. Steede, 198 Miss. 530, 539-41, 23 So. 2d 756, 757 (1945) (danger to fishing resort due to pollution); Masonite Corp. v. Dennis, 175 Miss. 855, 861, 168 So. 613, 614 (1936) (pollution of creek by factory); Masonite Corp. v. Burnham, 164 Miss. 840, 858-60, 146 So. 292, 296 (1933) (pollution of stream by emitting refuse); Mississippi Mills Co. v. Smith, 69 Miss. 299, 303-05, 11 So. 26, 27 (1891) (pollution of stream by factory).

[34] *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 18 (1981) (damages not available under Federal Water Pollution Control Act or Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1401-1444 (1982)); *see also infra* notes 187-89 and accompanying text (discussion of statutory remedies for plaintiff).

[35] *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1050 (2d Cir. 1985) (pendent jurisdiction). *See generally* 3 W. RODGERS, JR., ENVIRONMENTAL LAW, PESTICIDES AND TOXIC SUBSTANCES § 7.4, at 546 (1988) (discussing manner in which nuisance

IV. PREEMPTION CONCERNS

With extensive federal environmental legislation, the first question to be addressed is whether common-law actions have been preempted. In a trio of decisions, the Supreme Court has clearly recognized the continuing validity of nuisance actions for water pollution cases, despite arguments that they had been preempted by the federal Clean Water Act.[36]

Federal preemption of state law is dependent on congressional intent.[37] Congress can preempt state law in two ways, either expressly or through implication.[38] Since the Clean Water Act,[39] like most other environmental statutes,[40] does not expressly preempt common-law actions, the question to be resolved is whether the Act is inconsistent with the application of state law.[41] Implied preemption exists only to the extent that "it is impossible to comply with both state and federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes of Congress."[42]

The Clean Water Act is an all-encompassing program of

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suits may be brought in federal court).

[36] Although this analysis is based solely on the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982 & Supp. III 1985), *as amended by* Water Quality Act of 1987, Pub. L. No. 100-4, 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7, many other federal environmental statutes contain identical savings clauses. *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2619(c)(3) (1982); Resource Conservation and Recovery Act 42 U.S.C. § 6972(f) (1982); Clean Air Act, 42 U.S.C. § 7604(e) (1982). As such, the Court's analysis of the continuing validity of nuisance claims would seem to apply to other forms of pollution.

[37] *See* California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581 (1987) (state law preempted when Congress evidenced intent to occupy field or when state law actually conflicts with federal law); Chevron USA, Inc. v. Hammond, 726 F.2d 483, 488 (9th Cir. 1984) (congressional intent is "touchstone" of federal preemption), *cert. denied*, 471 U.S. 1140 (1985).

[38] Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U PA. L. REV. 121, 196-97 (1985); *see also* California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581 (1987) (discussing ways in which federal law may preempt state law).

[39] 33 U.S.C. §§ 1251-1376 (1982 & Supp. III 1985), *as amended by* Water Quality Act of 1987, Pub. L. No. 100-4, 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7.

[40] *See, e.g.*, Toxic Substance Control Act, 15 U.S.C. § 2619(c)(3) (1982) (containing no explicit preemption of common law); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(f) (1982) (same); Clean Air Act, 42 U.S.C. § 7604(e) (1982) (same).

[41] Glicksman, *supra* note 38, at 196-97.

[42] Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

water pollution regulation, designed to establish a comprehensive long-range policy for the elimination of water pollution. The program is based on permits and effluent limitations on the discharge of pollutants into waters of the United States.[43] In addition to state and federal roles in regulating the effluent limitations established in the permits,[44] there is a provision for citizen suit enforcement of the Act.[45] The citizen suit section contains a savings clause covering suits outside the Act:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a state agency).[46]

This clause is at the heart of three Supreme Court decisions which define the role of common-law nuisance in light of federal environmental legislation.

In *Illinois v. City of Milwaukee* (*Milwaukee I*),[47] Illinois petitioned the Supreme Court for leave to file a complaint under the Court's original jurisdiction, alleging that pollution from sewer and storm overflows during periods of heavy rainfall and from inadequately treated sewage dumped by Milwaukee and other Wisconsin cities into Lake Michigan constituted a public nuisance.[48] Illinois did not allege any statutory violations.[49] The

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[43] Although the Act refers to discharges into "navigable waters," *see, e.g.*, 33 U.S.C. §§ 1344(a), 1362(12) (1977), the term "navigable waters" is defined as the waters of the United States, including the territorial seas. 33 U.S.C. § 1362(7) (1977). Thus, the word "navigable" seems to have lost most of its meaning. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139 (1985) ("navigable waters" extends to encompass wetlands); *see also* Cinque Bambini Partnership v. State, 491 So. 2d 508, 516 (Miss. 1986) (finding water navigable if one could "hoist a sail upon a toothpick").

[44] *See* 33 U.S.C. §§ 1311-1345, 1370 (1982 & Supp. III 1985); *id.* § 1370 (regulating effluent limitations established in permits).

[45] 33 U.S.C. § 1365 (1982 & Supp. III 1985).

[46] *Id.* § 1365(e).

[47] 406 U.S. 91 (1972) [hereinafter *Milwaukee I*]. Ironically, interstate common-law water pollution nuisance suits originated in a case where Missouri complained that Illinois was polluting its water through sewage discharges into Lake Michigan. *See* Note, *supra* note 28, at 512 n.7 (discussing Missouri v. Illinois, 200 U.S. 496 (1906)).

[48] *Milwaukee I*, 406 U.S. at 93. The Supreme Court is granted original jurisdiction in certain cases by U.S. CONST. art. III, § 2, cl. 2, and 28 U.S.C. § 1251 (1948).

[49] *Milwaukee I*, 406 U.S. at 93. The State of Wisconsin brought a separate action in

Supreme Court declined to take jurisdiction because the action was not between two states.[50] The Court did, however, hold that an action could be brought and that the question arose under the laws of the United States for purposes of federal question jurisdiction.[51] The federal common law of nuisance, not a state cause of action, was held to apply because state common-law remedies were preempted by "the interstate character of the dispute,"[52] and "the federal interest in a uniform rule of decision."[53] Thus, while a nuisance claim could be asserted under the pre-1972 statute,[54] it was "federal, not state, law that in the end controls the pollution of interstate or navigable waters."[55] The case was remanded to the district court, where Illinois was permitted to seek remedies under the federal common law of nuisance.[56]

Just five months after Illinois filed its complaint in the United States District Court for the Northern District of Illinois, the Clean Water Act was significantly amended.[57] Milwaukee unsuccessfully argued to the district court that these amendments preempted the federal common law of nuisance. The dis-

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state court to enforce the National Pollutant Discharge Elimination System (NPDES) permits that it had issued. *Id.* The state court ordered Milwaukee to comply with its permits. *Id.*

[50] *Id.* at 104. Since Milwaukee is not a state, original jurisdiction was not mandatory. *Id.* The Court declined to hear the case under its permissive jurisdiction because another forum was available. *Id.*

[51] *Id.* at 100, 107.

[52] *Id.* at 103. For a thorough account of the federal common law of nuisance, see F. SKILLERN, ENVIRONMENTAL PROTECTION, THE LEGAL FRAMEWORK, §§ 4.22-.27 (1981).

[53] *Milwaukee I*, 406 U.S. at 102. The federal common law of nuisance applied to public, not private nuisances. Committee for the Consideration of Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1010 (4th Cir. 1976).

[54] Federal Water Pollution Control Act of 1948, ch. 758, 62 Stat. 1155 (superseded 1972).

[55] *Milwaukee I*, 406 U.S. at 102.

[56] *Milwaukee I*, 406 U.S. at 93, 108. The Court qualified its holding that the federal Act did not preempt federal common law, stating that "new federal laws and federal regulations may in time preempt the field of federal common law nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution." *Id.* at 107.

[57] Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (amended 1977). Prior to these amendments, Congress had criticized the judicial response to water pollution as being too "ad hoc" and "sporadic" to adequately deal with the mounting pollution problem. City of Milwaukee v. Illinois, 451 U.S. 304, 325 (1981).

trict court found that the Wisconsin cities were dumping substantial quantities of sewage into the lake, thereby threatening both the drinking quality of the water and the recreational use of the lake and creating a nuisance.[58] Accordingly, the district court ordered the Wisconsin cities to eliminate the raw sewage overflows and imposed effluent limitations on the sewage treatment plants more stringent than those required by the then current national pollution discharge elimination system (NPDES) permits.[59]

On appeal, the Court of Appeals for the Seventh Circuit affirmed the lower court's decision on the preemption issue, but held that "[i]n applying the federal common law of nuisance in a water pollution case, a court should not ignore the [Federal Water Pollution Control] Act but should look to its policies and principles for guidance."[60] Thus, while compliance with effluent limitations or permit provisions was not viewed as a defense to a nuisance suit, the court ruled that statutory standards should have been considered in fashioning the federal common law. Departure from these standards should be supported with compelling reasons. Accordingly, the court of appeals restructured the injunction to coincide with the effluent limitations established under the Act.[61]

In the return trip to the Supreme Court (*Milwaukee II*),[62] the Court held that the 1972 amendments had preempted federal common-law suits relating to water pollution.[63] Although

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[58] Illinois v. City of Milwaukee, 599 F.2d 151, 167-68 (7th Cir. 1979) (discussing district court findings), *cert. denied*, 451 U.S. 982 (1981).

[59] *Id.* at 167-69; *see also* Illinois *ex rel.* Scott v. City of Milwaukee, 366 F. Supp. 298, 299 (N.D. Ill. 1973) (district court order to eliminate sewage overflow and imposition of effluent limitations). The Wisconsin defendants had previously been found to be in violation of their permits and had been ordered to comply after the Wisconsin Department of Natural Resources had brought an enforcement action in state court. City of Milwaukee v. Illinois, 451 U.S. 304, 308 (1981).

[60] Illinois v. City of Milwaukee, 599 F.2d at 164.

[61] *Id.* at 173-77. The Seventh Circuit did, however, require Milwaukee to comply with the timetable the lower court had set for elimination of the overflows. *Id.* at 177. Although the timetable was more strict than the requirements of the permit, the court of appeals found that it was reasonable and supported by adequate evidence. *Id.* at 170-72.

[62] City of Milwaukee v. Illinois, 451 U.S. 304 (1981) [hereinafter *Milwaukee II*].

[63] *Id.* at 317-32. As the Court noted, the 1972 legislation was in fact a "total restructuring" of the Act. *Id.* at 317.

the Act contained a savings clause for state actions,[64] the extensive regulatory scheme for handling interstate water pollution problems had occupied the field of water pollution control so as to leave "no basis for a federal court to impose more stringent limitations . . . by reference to federal common law."[65] In remanding to the Seventh Circuit, the Court expressly reserved the question of whether state common-law remedies were preempted by the Clean Water Act.[66]

On remand, the Seventh Circuit was forced to address the issue of preemption of state common-law claims.[67] The court first considered the rationale behind *Milwaukee I* and its holding that federal common law preempted state law in the field of interstate water pollution.[68] It noted that the Supreme Court continued to cite *Milwaukee I* for the proposition that state law had been preempted in the field of interstate water pollution.[69]

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[64] 33 U.S.C. § 1365(e) (1982).

[65] *Milwaukee II*, 451 U.S. at 320. Justice Blackmun, dissenting, condemned this approach for its "automatic displacement" of federal common law. He argued that federal common law should still be available to fill gaps left by the legislation. *Id.* at 336. The majority, however, noted no gaps to be filled. *Id.* at 319.

[66] *Id.* at 310 n.4. The Court emphasized that under the separation of powers doctrine, federal common law is "subject to the paramount authority of Congress." *Id.* at 313. When Congress has "spoken directly to the question . . . previously governed by . . . federal common law, the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.* at 314. State nuisance law, however, was a different matter. "It is one thing . . . to say that the States may adopt more stringent limitations through state administrative processes, or even that States may establish such limitations through state nuisance law, and apply them to in-state discharges. It is quite another to say that the States may call upon *federal* courts to employ *federal* common law to establish more stringent standards applicable to out-of-state dischargers." *Id.* at 327-28.

[67] City of Milwaukee v. Illinois, 731 F.2d 403, 406-14 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985) [hereinafter *Milwaukee III*].

[68] *Milwaukee III*, 731 F.2d at 406-09.

[69] *Id.* at 409 (citing Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981)). The Seventh Circuit had previously held that the federal common law of nuisance was available for purely intrastate pollution. Illinois v. Outboard Marine Corp., 619 F.2d 623, 623-24 (7th Cir. 1980), *cert. granted and vacated*, 435 U.S. 917 (1981); *see also* Comment, *A Federal Common-Law Cause of Action for Nuisance Is Allowed Against an In-State Polluter of Interstate or Navigable Waters*, 56 NOTRE DAME LAW. 560, 567 (1981) (discussing application of federal common law by Seventh Circuit to intrastate pollution of interstate waters). *But see* Reserve Mining Co. v. E.P.A., 514 F.2d 492, 520-21 (8th Cir. 1983) (disallowing use of federal common law of nuisance in intrastate pollution); Committee for the Consideration of Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1009-10 (4th Cir. 1976) (same).

The court concluded that the reasons set forth in *Milwaukee I* were applicable to state common-law claims against out-of-state polluters, unless such claims had been preserved in a savings clause.[70] An analysis of the savings provisions in the Act led the court to conclude that such suits had not been preserved, because if such suits were permitted, it "would lead to chaotic confrontation between sovereign states."[71]

The Supreme Court declined hearing *Milwaukee* for a third time,[72] but ultimately addressed the same issue in *Ouellette v. International Paper Co.*[73] In that case, Vermont had initially filed an action in the Supreme Court against the State of New York and International Paper Company, alleging that International's discharge of waste into Lake Champlain constituted a public nuisance to Vermont residents.[74] The parties subsequently settled this litigation, with strict effluent limitations placed on International.[75] The settlement agreement, however, preserved private actions by Vermont residents for future violations by International.[76]

In 1978, landowners on Lake Champlain's Vermont shore brought a class action suit against International in Vermont State Court. They alleged that International's discharges into the lake constituted a private nuisance.[77] The plaintiffs sought injunctive relief as well as damages. After removing the case to federal court, International moved to dismiss the nuisance claim on the basis that state common-law claims had been pre-

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[70] *Milwaukee III*, 731 F.2d at 410-11.

[71] *Id.* at 414.

[72] Illinois v. City of Milwaukee, 469 U.S. 1196 (1985). Thus the Seventh Circuit's opinion is referred to as *Milwaukee III*.

[73] 479 U.S. 481 (1987).

[74] Vermont v. New York, 406 U.S. 186, 186 (1972) (granting motion for leave to file complaint).

[75] *See* Vermont v. New York, 419 U.S. 955, 955 (1974) (dismissing Vermont's complaint).

[76] Brief for Respondents at 3, International Paper Co. v. Ouellette, 479 U.S. 481 (1987)(No. 85-1233).

[77] Ouellette v. International Paper Co., 602 F. Supp. 264 (D. Vt.), *aff'd per curiam*, 776 F.2d 55 (2d Cir. 1985), *aff'd in part, rev'd in part*, 479 U.S. 481 (1987). In addition to the nuisance claims, plaintiffs asserted claims arising under the Clean Water Act and the Clean Air Act. Ouellette v. International Paper Co., 666 F. Supp. 58, 59-60 (D. Vt. 1987).

empted.[78] After reviewing the Seventh Circuit's decision in *Milwaukee III*, the Vermont district court determined that the Seventh Circuit had answered the wrong question.

> The issue presented . . . is not whether congressional legislation *preempted* state statutory and common law as it relates to interstate water pollution . . . . Rather, the . . . question is the extent to which Congress authorized, either expressly or implicitly, resort to state common law in a situation such as this.[79]

The district court identified three possible interpretations of the Clean Water Act's savings clause[80] in light of *Milwaukee I* and *Milwaukee II*.[81] The most restrictive view was that the only state common-law suits preserved were those involving waters not covered in the Clean Water Act.[82] The Seventh Circuit's intermediate view was that the Clean Water Act preserved a state's nuisance law only with respect to discharges within the state. The *Ouellette* district court adopted the least restrictive view that the Clean Water Act saved not only those actions included in the first two views but in interstate pollution cases also preserved the nuisance law of the state where the injury occurred.[83] Thus, the court refused to dismiss the plaintiffs' nuisance claims.

The Court of Appeals for the Second Circuit affirmed the district court with a per curiam order and the Supreme Court granted certiorari.[84] Justice Powell, writing for the majority, concluded that a private nuisance suit could be maintained in fed-

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[78] At this point in the litigation, the parties agreed that the motion to dismiss be deferred until the Seventh Circuit had decided the preemption issue in *Milwaukee III*. *Ouellette*, 602 F. Supp. at 265. However, the district court eventually opted not to follow the seventh circuit's opinion. *Id.* at 269.

[79] *Id.* at 268.

[80] 33 U.S.C. § 1365(e) (1982).

[81] *Ouellette*, 602 F. Supp. at 268 (citing Note, City of Milwaukee v. Illinois: *The Demise of the Federal Common Law of Water Pollution*, 1982 WIS. L. REV. 627, 664-71).

[82] No court had adopted this reading of the savings clauses. Hill, *Preemption of State Common Law Remedies by Federal Environmental Statutes*: International Paper Co. v. Ouellette, 14 ECOLOGY L. Q. 541, 548 (1987).

[83] *Ouellette*, 602 F. Supp. at 269.

[84] Ouellette v. International Paper Co., 776 F.2d 55 (2d Cir. 1985), *aff'd in part, rev'd in part*, 479 U.S. 481 (1987).

eral court in Vermont against a polluter from New York, but that the nuisance law of the source state, New York, must be applied.[85] Thus, unlike the Seventh Circuit in *Milwaukee III*, the Supreme Court permitted plaintiffs to sue in their own states;[86] but, unlike the lower courts in *Ouellette*, the Court held that the law of the defendant's state, not the plaintiff's state, applied.

In rejecting the most restrictive view of the Clean Water Act, the Court recognized that the savings clause for private suits manifested congressional intent to preserve some state causes of action with respect to water pollution.[87] Nonetheless, the Court concluded that application of Vermont law had been preempted. "[I]f affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the 'full purpose and objectives of Congress.' "[88]

The Court noted that application of the law of the affected state against an out-of-state polluter would undermine the Clean Water Act's permit system and effluent limitations.[89] If a polluter were in compliance with the limitations in the permit, but nonetheless held to constitute a nuisance, the defendant might be subject to damages and injunctive remedies under the laws of a number of states, despite full compliance with the Clean Water Act. The Court found this to be inconsistent with Congress' intent.[90]

The Court also expressed concern that such nuisance cases might "undermine the important goals of efficiency and predict-

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[85] Ouellette v. International Paper Co., 479 U.S. 481, 497-98 (1987).

[86] The Seventh Circuit had effectively held that a nuisance action could only be brought in the state of the polluter when it dismissed the complaints filed in the District Court for the Northern District of Illinois against the Wisconsin defendants. *Milwaukee III*, 731 F.2d 403, 414 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985).

[87] *Oulette*, 479 U.S. at 492-93.

[88] *Id.* at 493-94 (citing Hillsborough County v. Automated Laboratories, Inc., 471 U.S. 707, 713 (1985)).

[89] *Id.* at 494.

[90] *Id.* at 494-97. The awarding of damages in such a case might not be in conflict with the intent behind the Clean Water Act. *See* Hill, *supra* note 82, at 558. Injunctive relief under a common law theory, however, would clearly interfere with the purposes of the Act. *Ouellette*, 479 U.S. at 495.

ability in the permit system."[91] A point source operating in full compliance with the permit system might have discharges that find their way to several different states. If plaintiffs in each state were allowed to bring actions based on the common law of their states, it would be very difficult for the source to determine which standards would apply to it.[92] The Court concluded that Congress, by ensuring that the interests of the affected states are considered in the permit process,[93] had decided how to balance these concerns.[94] The Court held that the savings clause should not be read to undermine that decision.[95]

Although application of the nuisance law of the affected state was preempted, the Court found that suits applying the nuisance law of the source state are consistent with the structure and goals of the Clean Water Act and thus are preserved under the savings clause.[96] The home state of the polluter has express authority under the Act to enact requirements more strict than those prescribed by the Act.[97] Obviously, then, Congressional intent would not be frustrated by a suit under the source state's nuisance law.[98] Even if the nuisance standard deviated from that prescribed by the permit, the polluter would need only look to one standard, rather than several.[99]

The importance attached to this cause of action by both counsel and the Court is evident when one realizes that the issue has reached the Supreme Court three times since the enactment of most federal environmental legislation. From a practical standpoint, the doctrine is available in any water pollution case, and it should be available in most other environmental litiga-

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[91] *Oulette*, 479 U.S. at 496.

[92] A Minnesota company discharging into the Mississippi River, for instance, could possibly be subject to nuisance suits under the laws of nine downstream states. *Id.* at 496 n.17.

[93] *See* 33 U.S.C. § 1341(a), (d) (1982).

[94] *Oulette*, 479 U.S. at 497.

[95] *Id.* The Court commented that it would be "extraordinary" for Congress to tolerate such a result after it had devised an "elaborate" permit system. *Id.*

[96] *Id.* at 497-99.

[97] 33 U.S.C. §§ 1342(b)-(c), 1371 (1982).

[98] *Ouellette*, 479 U.S. at 497-99. States are free to establish the stricter standards either by direct regulation or by application of the doctrine of nuisance. *Id.*

[99] *Id.*

tion.[100] If the polluter is in the same state as the plaintiff, no special difficulty should arise. If the pollution has crossed a state line, then the nuisance law of the source state will be applied. In any case, the doctrine will prove useful to the plaintiff litigator who knows how to use it.[101]

V. Required Pleading and Proof

Standing for a common-law private nuisance suit is available to any lawful possessor of land who has been harmed.[102] The two basic components of such a claim[103] are that the defendant acted with the intent of interfering with the use and enjoyment of the plaintiff's property[104] and that a substantial and unreasonable interference with the plaintiff's use and enjoyment of his property did in fact result.[105] Once these two elements have been established, the plaintiff is entitled to a remedy. There are, however, certain difficulties of which the environmental attorney should take note.

A. Intent

The first component of a private nuisance, the defendant's

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[100] *See supra* note 36 and accompanying text. On remand to the district court, this same analysis was applied to the Clean Air Act. Ouellette v. International Paper Co., 666 F. Supp. 58, 61-62 (D. Vt. 1987).

[101] Mississippi has enacted several statutes dealing with nuisance, but the Mississippi Supreme Court has held that these statutes do not preempt common-law nuisance actions. Proby v. State *ex rel.* West, 498 So. 2d 792, 794 (Miss. 1986).

[102] Comment, *Absolute Liability in Mississippi Under the Theory of Nuisance*, 42 Miss. L.J. 488, 490 (1971); *see also* Reber v. Illinois Cent. R.R., 161 Miss. 885, 900, 138 So. 574, 577 (1932).

[103] *See* W. Prosser & W. Keeton, *supra* note 2, at 622. Prosser and Keeton have identified four components of a private nuisance by listing (in addition to intent) interference, substantial interference, and unreasonable interference separately. On the other hand, Professor Rodgers defined private nuisance as simply "a substantial and unreasonable interference with the use and enjoyment of an interest in land." W. Rodgers, *supra* note 11, at 107.

[104] W. Prosser & W. Keeton, *supra* note 2, at 622. The "intent" that must be established is not as burdensome as it might appear at first glance. *See infra* notes 106-121 and accompanying text. Professor Rodgers indicates that the interference may be established intentionally, recklessly, or negligently. W. Rodgers, *supra* note 11, at 107. Moreover, he has noted that "nuisance law is continuing on the road to becoming a strict liability tort." *Id.*

[105] W. Prosser & W. Keeton, *supra* note 2, at 622.

intent, is typically required in private nuisance cases, but not in public nuisance cases.[106] Originally, all nuisance cases (public and private) were decided under a strict liability standard.[107] Plaintiffs then realized that tort actions were easier to win under the strict liability doctrine of nuisance than under a negligence theory. If the defendant had created the nuisance in a negligent or reckless manner, and the plaintiff had also been negligent in some way, a negligence action might be barred by the doctrine of contributory negligence. However, the same suit brought under the strict liability theory of nuisance would not be barred.[108] As Judge Cardozo wrote, "it would be intolerable if the choice of a name [for the cause of action] were to condition liability."[109]

Because of this problem, actions by private litigants to remedy private or public nuisances evolved from the strict liability standard to the "intentionality" standard identified above.[110] This change has led some commentators to say that "the tort of nuisance [is] virtually identical with any negligent tort."[111] Fortunately for the environmental plaintiff, this is not the case. In the first instance, the intent requirement is satisfied if the defendant created or continued the nuisance with knowledge that harm to the plaintiff's interests was occurring or was substantially certain to follow.[112] Thus, "intent" does not mean that the defendant intended to interfere with the plaintiff's enjoyment of his land, or even that he negligently did so, but that mere knowledge is sufficient.[113]

Moreover, when there is physical damage to the plaintiff's land, water, or improvements, even unintentional or accidental

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[106] *See id.* at 624-25 (evolving of requirement of intent in private nuisance cases); Halper, *supra* note 3, at 10296 (discussing differences between private and public nuisance).

[107] W. PROSSER & W. KEETON, *supra* note 2, at 624; Halper, *supra* note 3, at 10294.

[108] Halper, *supra* note 3, at 10298.

[109] McFarlane v. City of Niagra Falls, 247 N.Y. 340, 345, 160 N.E. 391, 392 (1928).

[110] Halper, *supra* note 3, at 10298.

[111] *Id.*

[112] W. PROSSER & W. KEETON, *supra* note 2, at 624-25.

[113] When one understands this definition of intent, one can see that intent is a component of a nuisance action. However, when defining intent in a more traditional sense, it is clear that intent is not required to establish a nuisance. *See* Comment, *supra* note 102, at 499 ("there is no support for the proposition that under a 'theory of nuisance,' liability is based on intentional interferences . . . .").

interferences are generally actionable.[114] The rationale behind a fault-free standard for cases involving property is logical when one considers that the original reason for requiring intent was to prevent plaintiffs from avoiding the rules concerning contributory negligence.[115] The plaintiff's contributory negligence will rarely affect this type of nuisance case.[116] As one commentator has noted, "it may be just to require an actor who has commandeered another's property for his own purposes to pay for what he has taken, no matter how faultless and socially useful his conduct has been."[117] As such, when dealing with property rights, it is reasonable to speak in terms of strict liability.[118]

In *City of Jackson v. Filtrol Corp.*,[119] the city alleged that the defendant had contaminated its land with acid, making it more expensive for the city to maintain its sewage lines. The Fifth Circuit held that the city had made a showing sufficient to withstand a motion for a directed verdict. The court was very specific about the strict liability aspect of nuisance claims. The court noted that in Mississippi nuisance and trespass claims are

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[114] W. PROSSER & W. KEETON, *supra* note 2, at 624, 627. Mississippi law is clear on this point. If the plaintiff's property has been invaded by something which has escaped from the defendant's property, negligence by the defendant is irrelevant. *See* Comment, *supra* note 102, at 495-97 (citing various "slush pit" cases where the defendant was held liable based on "theory of nuisance" as opposed to negligence); *see also* Healey v. Citizen's Gas & Elec. Co., 199 Iowa 82, 201 N.W. 118 (1924) (allowing recovery under strict liability nuisance theory to plaintiff whose land was damaged by water from downstream dam). *See generally* Keeton, *Tort Liability and the Oil and Gas Industry II*, 39 TEX. L. REV. 253 (1961) (discussing theories of recovery where plaintiff's interests invaded physically or otherwise).

[115] *See supra* notes 107-09 and accompanying text.

[116] *See* W. RODGERS, *supra* note 11, at 134 (defense of contributory negligence, permitted by RESTATEMENT (SECOND) OF TORTS § 840B in narrow category of cases, is unlikely to arise).

[117] *Id.* at 109 (quoting James, *Memorandum on the Element of Fault in Private Nuisance*, in RESTATEMENT (SECOND) OF TORTS app. A, at 131, 156 n.43 (Tent. Draft No. 16, 1970)); *see also* Blue v. Charles F. Hayes & Assocs., Inc., 215 So. 2d 426, 428 (Miss. 1968) ("When one makes such use of his own land so as to unreasonably interfere with the rights of his neighbors in the exercise of their privileges or use of their lands, and when appreciable or actual damage is shown, he should be made to pay damages or cease such use.").

[118] *See* Comment, *supra* note 102, at 499 ("The Mississippi version of strict liability in nuisance, recognized in practice, if not in name, is apparently based on a very high regard for the inviolability of private property rights.").

[119] 624 F.2d 1384 (5th Cir. 1980).

not distinct in actions such as this. If the defendant causes the plaintiff's land to be polluted, the defendant is strictly liable, regardless of negligence.[120] Accordingly, the "intent" aspect of a nuisance claim should not pose a significant difficulty to the environmental plaintiff.[121]

B. Interference with Property

In order for an interference with land to constitute a nuisance, the invasion of the plaintiff's interests must be both substantial and unreasonable.[122] Substantial interference is that which causes significant harm to the plaintiff.[123] Thus minor interferences of a short duration will not amount to a nuisance.[124] The harm, however, is not limited to physical harm or injury.[125] The standard for determining whether the harm is substantial is to be determined by looking to the senses of a "normal person in the community."[126] When the invasion affects the physical condition of the plaintiff's land, the substantial or significant nature of the interference is established.[127] Thus, for the typical environmental plaintiff in a nuisance suit, the requirement of sub-

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[120] *City of Jackson*, 624 F.2d at 1389. This was a public nuisance case. *Id.*

[121] *See also* Blue v. Charles F. Hayes & Assocs., 215 So. 2d 426, 428 (Miss. 1968) (defendant could be liable under theory of nuisance without establishing negligence by defendant); Love Petroleum Co. v. Jones, 205 So. 2d 274, 275 (Miss. 1967) (plaintiff entitled to at least nominal damages on showing of invasion); Southland Co. v. Aaron, 221 Miss. 59, 73-74, 72 So. 2d 161, 166-67 (1954) (negligence not needed to establish nuisance).

[122] W. PROSSER & W. KEETON, *supra* note 2, at 626.

[123] *Id.*

[124] *See* White v. Lewis, 213 Miss. 686, 691, 57 So. 2d 497, 498 (1952). In *White*, the plaintiff claimed that the defendant had created a nuisance by, *inter alia*, spreading trash near plaintiff's land. *Id.* at 691, 57 So. 2d at 498. The court determined that a remedy was not appropriate as to the garbage, based upon a determination that it was not of a continuing nature. *Id.*; *see also* Laurel Equip. Co. v. Matthews, 218 Miss. 718, 721, 67 So. 2d 258, 260 (1953) (harm suffered must be material).

[125] *See* Phillips v. Davis Timber Co., 468 So. 2d 72, 79 (Miss. 1985) (plaintiff entitled to recover damages due to invasion of sublethal levels of pentachlorophenol, despite lack of damage to aquatic wildlife or human beings).

[126] W. RODGERS, *supra* note 11, at 112. Professor Rodgers questions this standard, which is derived from the RESTATEMENT (SECOND) OF TORTS, by noting the theoretical possibility under this formulation of committing "a homicide by directing maddening noise at a peculiarly susceptible neighbor and at the same time avoid[ing] civil liability for maintaining a nuisance." *Id.* at 113.

[127] W. PROSSER & W. KEETON, *supra* note 2, at 627.

stantiality should not pose a significant barrier.[128]

The interference with the plaintiff's interest must also be unreasonable in order for a nuisance to be declared.[129] This does not mean that the defendant's activities must be unreasonable, only that the burden on the plaintiff must be unreasonable.[130] The reasonableness of the burden is to be determined by the jury.[131] "There is no hard and fast controlling rule; for the use under one set of facts might be reasonable, and unreasonable under another."[132] In order for the nuisance to be actionable, however, it must be of such magnitude and intensity as to cause "actual physical discomfort and annoyance to a person of ordinary sensibilities."[133] Once that is established, even if the defendant is using the utmost care in operating the complained-of activity, an action for nuisance is appropriate, if the plaintiff's property is burdened unreasonably.[134] Accordingly, if the envi-

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[128] Several Mississippi cases have awarded nominal damages to the plaintiff, suggesting that the requirement of a substantial interference is dubious. Comment, *supra* note 102, at 499; *see* Love Petroleum Co. v. Jones, 205 So. 2d 274, 275 (Miss. 1967) (plaintiff entitled to at least nominal damages on showing of invasion); Cochran v. Consumers' Wirebound Box Co., 246 Miss. 398, 401, 149 So. 2d 844, 845 (1963) (although incinerator was modern and efficient, and defendant had to dispose of trash somehow, plaintiff was entitled to at least nominal damages due to ashes); Central Oil Co. v. Shows, 246 Miss. 300, 312, 149 So. 2d 306, 311 (1963) (allowing nominal damages).

[129] Blue v. Charles F. Hayes & Assocs., 215 So. 2d 426, 428 (Miss. 1968).

[130] W. PROSSER & W. KEETON, *supra* note 2, at 629.

[131] *See* Jenner v. Collins, 211 Miss. 770, 775, 52 So. 2d 638, 640 (1951) (whether noise constitutes nuisance is ordinarily question of fact depending on all attending or surrounding circumstances) (citing 66 C.J.S. *Nuisances* § 22(b) (1950)); W. PROSSER & W. KEETON, *supra* note 2, at 629; *see also* Comment, *supra* note 102, at 489 (standard of reasonableness of use of defendant's property is whether average man residing in locality would view harm suffered by plaintiff as substantial discomfort or inconvenience).

[132] Reber v. Illinois Cent. R.R., 161 Miss. 885, 898, 138 So. 574, 577 (1932).

[133] *See Jenner*, 52 So. 2d at 640 (holding noise from drive-in movie theater constituted nuisance).

[134] W. PROSSER & W. KEETON, *supra* note 2, at 629; *see also* Annotation, *Landowner's Right to Relief Against Pollution of His Water Supply by Industrial or Commercial Waste*, 39 A.L.R.3d 910, 922-23 (1971) (water pollution as nuisance). If the defendant's property creates the nuisance, the defendant is responsible, even if the defendant was not responsible for the creation of the condition in the first place. F. GRAD, *supra* note 6, § 4A.03, at 4A-197 (citing Ayers v. Township of Jackson, 15 ENVTL. L. REP. (ENVT. L. INST.) 20642 (N.J. Super. Ct. App. 1985)); *see also* Halper, *supra* note 15, at 10044-45 (liability is based on use). Moreover, the remedy should not be delayed. *See* Board of Health v. Copcutt, 140 N.Y. 12, 21, 35 N.E. 443, 445 (1893) (public authorities "ought not to wait until some citizen is sick or dead before they prevent or abate the

ronmental plaintiff's property has been burdened, none of the elements of nuisance seem to present difficult standards to meet.

After the plaintiff has established that the defendant has substantially and unreasonably interfered with the plaintiff's use, enjoyment, and value of his property, the burden shifts to the defendant to establish that its use was reasonable or the interference inconsequential.[135] This burden is a particularly difficult one to carry. The defendant is not excused simply because the offensive conduct is necessary, modern, or efficient.[136] Nor is the defendant excused because it is unable to obtain better equipment because of events beyond its control.[137] Moreover, if the plaintiff's land is imposed upon, it may be almost impossible to prove that the defendant's use is reasonable. Thus, in *Alfred Jacobshagen Co. v. Dockery*,[138] where the plaintiffs complained of offensive odors, the court stated, "[A] reasonable use of one's property cannot be construed to include those uses which produce obnoxious smells, which in turn result in a material injury to owners of property in the vicinity, causing them to suffer substantial annoyance, inconvenience, and discomfort."[139] Thus it will be difficult for the defendant to carry this burden if the plaintiff establishes a prima facie case.

C. *Statutory Matters*

State statutes often define certain activities as nuisances.[140]

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nuisance causing the injurious result").

[135] RESTATEMENT (SECOND) OF TORTS § 822 (1979); W. PROSSER & W. KEETON, *supra* note 2, at 622-23.

[136] Cochran v. Consumers' Wirebound Box Co., 246 Miss. 398, 401, 149 So. 2d 844, 845 (1963) (although incinerator was modern and efficient, and defendant had to dispose of trash somehow, plaintiff was entitled to at least nominal damages due to ashes); King v. Vicksburg Ry. & Light, 88 Miss. 456, 488, 42 So. 204, 205 (1906) (liability for damages held jury issue, despite defendant's use of best machinery, skillful employees and management "above criticism").

[137] *Jenner*, 52 So. 2d at 640-41. The Court held that a drive-in movie theater operator's argument that in-car speakers were not available because of war conditions was not a sufficient excuse for the operating nuisance. *Id.*

[138] 243 Miss. 511, 139 So. 2d 632 (1962).

[139] *Dockery*, 139 So. 2d at 634. The offensive odors emanated from an animal rendering plant. *Id.* at 632-33.

[140] Mississippi statutorily defines nuisance as a place where lewdness, assignation, or prostitution takes place or where controlled substances are found. MISS. CODE ANN. § 95-

Some statutes provide guidelines for conduct, but they do not declare that violations constitute public nuisances.[141] Compliance with these statutory guidelines will not shield the defendant from a common-law nuisance suit;[142] however, violation of such statutes by the defendant can make the plaintiff's case much easier. For instance, in *Vicksburg Chemical Co. v. Thornell*,[143] fifteen residents around a chemical plant filed suit alleging that the chemical plant polluted their property and constituted a nuisance. The trial court consolidated the cases into three trials, with five plaintiffs involved in each trial. At trial, three of the jury instructions were based primarily on the Mississippi Air and Water Pollution Control Act.[144] The Mississippi

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3-1 (Supp. 1989); *see supra* note 9 and accompanying text (discussing statutory definitions of public nuisance). There are, however other nuisance statutes. *See, e.g.*, MISS. CODE ANN. § 41-23-13 (1972) (thing calculated to spread disease may be declared nuisance); MISS. CODE ANN. § 49-17-29(2)(a) (Supp. 1989) (dumping wastes into waters of state is nuisance); MISS. CODE ANN. § 99-27-23 (1972) (clubs, boats, places where liquor found may be abated as nuisance in suit brought by attorney for state who is charged with prosecuting criminal actions); MISS. CODE ANN. § 95-3-25 (1972) (similar rule for places where gambling devices are kept). Mississippi's statutory scheme, *see* MISS. CODE ANN. §§ 95-3-1 to -29 (1972 & Supp. 1989), also provides certain rules of procedure and evidence. These sections were intended to supplement, however, rather than replace common-law rules. Proby v. State *ex rel.* West, 498 So. 2d 792, 795 (Miss. 1986). Since they are directed against specific types of nuisances, their provisions are not necessarily applicable to common-law nuisances. *Id.* The *Proby* court held that provisions relating to houses of prostitution were inapplicable to common-law nuisance claim made against a lounge. *Id.*

[141] *See, e.g.*, MISS. CODE ANN. § 49-17-29 (unlawful for any person to cause pollution of air or to place any waste or other products in location where they are likely to cause air pollution).

[142] *See* King v. Vicksburg Ry. & Light Co., 88 Miss. 456, 486, 42 So. 204, 205 (1906) (defendant's claim of exemption from liability due to operation under "public authority" rejected by court); *see also* Heinl v. Pecher, 330 Pa. 232, 198 A. 797, 800-01 (1938) (noting that operation of incinerator would be nuisance, regardless of compliance with any zoning ordinance). Although it is well established that a permit or compliance with regulations will not shield the defendant from an action for a private nuisance, whether the same can be said as to public nuisance suits is somewhat unclear. F. GRAD, *supra* note 15, § 4A.03, at 4A-200. *But see* Town of Mount Pleasant v. Van Tassell, 7 Misc. 2d 643, 166 N.Y.S.2d 458, 461 (Sup. Ct. 1957) (operation of "piggery" found to be public nuisance despite legality of operation), *aff'd*, 6 A.D.2d 880, 177 N.Y.S.2d 1010 (App. Div. 1958).

[143] 355 So. 2d 299 (Miss. 1978).

[144] MISS. CODE ANN. § 49-17-29 (Supp. 1989). The relevant portion provides, "It shall be unlawful for any person (i) to cause pollution of the air in the state or to place or cause to be placed any wastes or other products or substances in a location where they are likely to cause pollution of the air . . . ." *Id.*

Supreme Court held that it was proper to instruct the jury that violation of an air pollution law can support a finding of nuisance.[145] The jury awards, however, indicated that the jury had been confused; therefore a new trial was ordered with respect to damages alone.[146]

The important aspect of this holding is that statutory violations can be used to establish common-law nuisance.[147] If the legislature has declared that a certain activity is a nuisance, courts "invariably" defer to that determination.[148] Thus, it is wise to inspect the statutory scheme for legislatively determined nuisances.[149] If the legislation regulates or prohibits an activity, without labeling it a nuisance, *Vicksburg Chemical* reflects the rule that evidence of the violation is still relevant in determining whether the activity constitutes a nuisance.[150] Accordingly, a careful review of the state's statutory scheme is very important to the environmental plaintiff.[151]

D. Causation Problems

Despite its many advantages, there are certain drawbacks

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[145] *Thornell*, 355 So. 2d at 301.

[146] *Id.* at 302.

[147] *See, e.g.*, Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331, 338 (4th Cir. 1983) (RCRA violations used to support finding of common-law nuisance); Branch v. Western Petroleum, Inc., 657 P.2d 267, 277 (Utah 1982) (violation of groundwater contamination statute is per se nuisance). *But see* Department of Envtl. Quality v. Chemical Waste Storage & Disposition, Inc., 19 Or. App. 712, 528 P.2d 1076, 1081 (1974) (that hazardous waste storage site was being operated in violation of hazardous waste statutes does not require finding that it is public nuisance).

[148] W. RODGERS, *supra* note 11, at 136.

[149] In Mississippi, the legislature has determined that polluting the water is a nuisance. MISS. CODE ANN. § 49-17-29 (Supp. 1989); *see also* MISS. CODE ANN. § 41-23-13 (1972) (any matter or thing calculated to spread disease may be declared nuisance); MISS. CODE ANN. § 99-27-23 (1972) (clubs or boats where liquor is found shall be deemed common nuisance). *See generally* MISS. CODE ANN. § 95-3-25 (1972) (clubs, boats and places where liquor is found may be abated as nuisance).

[150] The proper remedy in such case may depend on a balancing of the equities, even where injunctive relief is statutorily authorized. Thus, in Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982), the Court held that violations of the Federal Water Pollution Control Act need not be enjoined, even though injunctive relief was the remedy provided for in the legislation. *Id.* at 320. The Court found that the judiciary retained discretion to order other relief to achieve compliance. *Id.*

[151] *See supra* note 149.

associated with common-law nuisance. The greatest difficulty encountered by plaintiffs has typically been proof of causation.[152] All of the common-law tort doctrines require the plaintiff to establish a causal link between the defendant's wrongdoing and the plaintiff's injury.[153] With a still evolving body of scientific knowledge concerning toxic effects, this can pose a significant problem to the environmental plaintiff.[154] Careful planning and preparation are needed to avoid this potential pitfall.

Miller v. National Cabinet Co.,[155] while not a nuisance case, illustrates the causation problems typical of common-law doctrines. In that case, the widow of a furniture finisher sought workmen's compensation after her husband died from leukemia. She claimed that the leukemia had been caused by her husband's exposure to benzene in the workplace. Although the Workmen's Compensation Board reversed the Referee and awarded benefits, the court overturned the Board and denied benefits because there was no evidence of causation.[156] At the hearing only one doctor had identified any causal relationship between benzene and leukemia, and his opinion was very guarded.[157] This was insufficient for the plaintiff to carry her burden.

The *Miller* case had three distinct causation problems. First, there was insufficient evidence to establish that benzene exposure could lead to leukemia in humans. The plaintiff had no

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[152] F. GRAD, *supra* note 6, § 4A.03, at 4A-215 (proof of causation is "the most difficult burden that a plaintiff carries in a toxic tort case"). Because of the difficulty in establishing causation, especially with chronic as opposed to acute toxicity, some plaintiffs have turned (with mixed success) to theories involving severe emotional stress or "cancer phobia." J. BONINE & T. MCGARITY, THE LAW OF ENVIRONMENTAL PROTECTION 676 (1984); *see also* Farber, *Toxic Causation*, 71 MINN. L. REV. 1219, 1226-37 (1987) (discussing causation problem in context of toxic torts).

[153] J. BONINE & T. MCGARITY, *supra* note 152, at 676.

[154] *See, e.g.*, Sterling v. Velsicol Chem. Corp., 647 F. Supp. 303 (W.D. Tenn. 1986) (rejecting the plaintiff's claims of causation because experts were not able to express reasonable medical certainty), *aff'd in part, rev'd in part*, 855 F.2d 1188, 1215 (6th Cir. 1988).

[155] 8 N.Y.2d 277, 204 N.Y.S.2d 129, 168 N.E.2d 811 (App. Div. 1960).

[156] *Miller*, 204 N.Y.S.2d at 137-38, 168 N.E.2d at 817.

[157] Dr. Paul Reznikoff testified that incidence of leukemia "is quite high in patients who have been exposed to [benzene]," and that "it is [quite] possible that this man's leukemia resulted from his alleged exposure . . . ." *Id.* at 132-33, 168 N.E.2d at 813-14.

epidemiological evidence, nor was there any evidence from animal studies on this point.[158] This, of course, was due in large part to limited scientific knowledge. The second causation problem was in establishing that benzene exposure had caused Mr. Miller's leukemia. Even if it had been established that benzene could cause leukemia, it would not necessarily follow that Mr. Miller contracted his disease that way. Finally, Mr. Miller had been exposed to benzene while working for five different employers.[159] Accordingly, there was a problem in determining which defendant's benzene (if any) had caused the leukemia.

The first causation problem, establishing a link between the specific pollutant and the injury suffered by the plaintiff, will pose a problem whenever the injury is not immediately apparent. Thus, if the alleged nuisance involves noise from a neighboring plant, it should not be hard to prove that this might interfere with the plaintiff's sleep. However, when the claim is that a certain chemical has created some type of chronic health problem, the jury will not have a common body of knowledge upon which to draw, and scientific evidence will be needed. This will likely require expert witnesses well versed in the relevant scientific field. Problems are most likely to arise when the scientific knowledge is limited or subject to dispute.

The *Agent Orange* litigation[160] illustrates such a problem. The plaintiffs[161] in that case relied mainly on animal studies and "industrial accidents"[162] to prove causation. The defendants, however, were able to win on summary judgement by producing conflicting epidemiological studies.[163] The court found that the studies relied upon by the plaintiffs' experts were nonproba-

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[158] When available, epidemiological evidence is the scientific proof most favored by courts. *See* Richardson v. Richardson — Merrell Inc., 857 F.2d 823, 831-33 (D.C. Cir. 1988) (rejecting evidence based on animal, test tube, and chemical structure studies in favor of published human studies); *see also In Re* Agent Orange Prod. Lib. Litig., 611 F. Supp. 1223, 1250-55 (E.D.N.Y. 1985) (animal studies failed to establish causation).

[159] *Miller*, 204 N.Y.S.2d at 130, 168 N.E.2d at 812.

[160] *In re* Agent Orange Prod. Liab. Litig., 611 F. Supp. 1223 (E.D.N.Y. 1985).

[161] *Id.* at 1230-31. These plaintiffs had opted out of a class settlement. *Id.*

[162] *Id.* at 1231. This was the term used by the court for human data which did not come from epidemiological studies. *Id.*

[163] *Id.* at 1259-60.

tive[164] and formed an insufficient basis for an expert's opinion.[165] The court said that the "only useful studies having any bearing on causation"[166] were epidemiological studies.[167] While not all courts will demand epidemiological evidence,[168] it may well be true that the "burden of proof [is] more scientific than legal."[169]

Against this background, how is the environmental attorney to approach the plaintiff's case? Preparation is the key. The following points should be considered.[170] The attorney should carefully examine the expert, the expert's credentials, and the basis for the expert's opinion. The expert should have licenses, certifications, and memberships in relevant recognized scientific or medical organizations. His opinion should be based on recent peer-reviewed publications and leading texts. The expert should also be familiar with conflicting studies and theories. Additionally, the attorney must recognize that legal causation may differ from causation in the expert's profession.[171] The attorney must ask the proper questions to make the expert use the precise language to meet the prerequisites of legal causation.

Once the plaintiff has established that exposure to the element at issue can lead to the problem complained of, the next

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[164] *See* FED. R. EVID. 401-03 (concerning relevant and prejudicial evidence).

[165] *See* FED. R. EVID. 703 (concerning bases of opinion testimony by experts).

[166] *Agent Orange*, 611 F. Supp. at 1231.

[167] *Id.* at 1231; *see also* Brock v. Merrell Dow Pharmaceuticals, Inc., 874 F.2d 307, 315 (5th Cir. 1989) (lack of conclusive epidemiological proof held fatal to case); *In re* Paoli R.R. PCB Lit., 706 F. Supp. 358, 370-75 (E.D. Pa. 1988) (evidence from laboratory animals and chemical reaction studies held insufficient to establish causation); Lynch v. Merrell-National Laboratories, 646 F. Supp. 856, 863 (D. Mass. 1986) (reanalysis of epidemiological studies criticizing their methodology held inadmissible to show causation).

[168] *See, e.g.*, Peteet v. Dow Chem. Co., 868 F.2d 1428, 1433 (5th Cir. 1989) (scientific consensus does not affect admissibility of expert's opinion, rather it will go to weight given testimony); Villari v. Terminix Int'l, Inc., 692 F. Supp. 568, 572 (E.D. Pa. 1988) (distinguishing *Lynch* and *Agent Orange* cases).

[169] Broaddus & Simon, *Preparing Experts in Toxic Tort Cases*, 25 TRIAL, Oct. 1989, at 37.

[170] Many of these suggestions are derived from Broaddus & Simon, *supra* note 169, at 36-37.

[171] For instance, the legal causation discussed in this article would be termed efficient causation by a philosopher or a psychiatrist. However, material causation, formal causation, and final causation all have separate and different meanings in those professions. *See* Rychlak & Rychlak, *The Insanity Defense and the Question of Human Agency*, 8 N. IDEAS IN PSYCHOLOGY 3 (1990).

causation issue is whether that exposure caused this particular plaintiff's condition.[172] The plaintiff's medical records must be carefully reviewed to determine whether the problem complained of existed prior to exposure. The attorney should also consider the plaintiff's work history or other opportunities for exposure to harmful pollutants. If possible, the expert should personally examine the plaintiff and perform any necessary tests or experiments so that his opinion can relate to this plaintiff's specific problem.[173] If the jury is convinced that exposure can result in the problem experienced by the plaintiff, and exposure is clearly established, then the jury should be sympathetic to the plaintiff's situation.

The final causation issue is linking the defendant with the pollutant. Often this evidence will be easy for the plaintiff to produce, or it will be available through discovery. For instance, if the nuisance is dust from a cement plant, it should not be hard to establish that the dust comes from the defendant's cement plant. If there is only one source for the pollutant, as is often true with toxic substances,[174] this linkage should not be hard to establish.[175] If the plaintiff has been exposed to the pollutant by more than one source, the court may turn to some type

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[172] As *Miller* illustrates, this element is necessary when the plaintiff is seeking money damages. When the plaintiff seeks only injunctive relief, however, threatened rather than actual injury to the plaintiff will suffice to warrant such a remedy. Gulf Park Water Co. v. First Ocean Springs Dev. Co., 530 So. 2d 1325, 1334 (Miss. 1988) ("an injunction will be available, despite the absence of demonstrable harm, to prevent a trespass or abate a nuisance"); *see also* Village of Wilsonville v. SCA Servs., Inc., 86 Ill. 2d 1, 499, 426 N.E.2d 824 (1981) (equitable relief can be based on threatened rather than actual harm); Wood v. Picillo, 443 A.2d 1244, 1247 (R.I. 1982) ("The essential element of an actionable nuisance is that persons have suffered harm or are *threatened* with injuries that they ought not have to bear.") (emphasis added). *See generally* J. BONINE & T. MCGARITY, *supra* note 152, at 1007-18 (discussion of causation requirement in common-law nuisance action).

[173] At least with certain toxic substances, it may be "possible to fingerprint and trace toxic chemicals from their source to the victim's residence, many dozen miles away." Meyer, *The Environmental Fate of Toxic Wastes, the Certainty of Harm, Toxic Torts, and Toxic Regulation*, 19 ENVTL. LAW 321, 334 (1989). *But see In re* Paoli R.R. PCB Lit., 706 F. Supp. 358, 370 (E.D. Pa. 1988) (excluding such evidence as beyond expert's field of expertise).

[174] J. BONINE & T. MCGARITY, *supra* note 152, at 658.

[175] Some chemicals can be "fingerprinted," which might make tracing them back to the defendant easier. *See supra* note 173.

of apportioning[176] or joint and several liability.[177] While this issue may lead to some occasional difficulty, this causation problem should be fairly familiar to most litigators.

The United States Court of Appeals for the Fifth Circuit had reason to consider the causation problem in a nuisance suit based on chemical dumping in *Booth v. Garan, Inc.*[178] In that case, the defendant had dumped chemical waste in a drainage ditch near the plaintiff's land. The plaintiff claimed that odors and vapors created by the dumping constituted a private nuisance.[179] No damages were allowed, however, because of the jury's determination that the plaintiff had not established a causal link between the dumping and plaintiff's injuries.[180] The opinion remains somewhat unclear as to whether the "missing [causal] link" was between the vapors and the plaintiff's injury, or whether it was between the defendant's dumping and the vapors. Both must be established to be successful on the nuisance claim.

It is unlikely that all of these causation problems will be present in every case. For instance, there may not be a claim relating to physical injury. In such a case, many of the scientific problems would be avoided. In other cases (such as a benzene exposure case today[181]), the "scientific causation" will not be in doubt. Moreover, some recent cases seem to require less in the way of proof of causation.[182] In every case, however, the plaintiff

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[176] *See* Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 145-46, 607 P.2d 924, 937-38 (apportioning damages among all potentially responsible manufacturers of drug in proportion to their market share), *cert. denied*, 449 U.S. 912 (1980).

[177] *See* Borel V. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1103 (5th Cir. 1973) (all former employers who exposed plaintiff to asbestos held jointly and severally liable).

[178] 476 F.2d 591 (5th Cir. 1973) (per curiam).

[179] *Booth*, 476 F.2d at 591.

[180] *Id.* at 592. The court did, however, expressly note that this case did not allege interference with plaintiff's enjoyment of his property. *Id.* That allegation was part of a separate suit, in which the defendant conceded that at least nominal damages might be required. *Id.*

[181] *See* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 632-36 (1980) (recognizing that at certain concentrations benzene is harmful and can cause leukemia).

[182] Village of Wilsonville v. SCA Servs., Inc., 86 Ill. 2d 1, 426 N.E.2d 824, 842 (1981) (equitable relief can be based on threatened rather than actual harm); Wood v. Picillo, 443 A.2d 1244, 1247 (R.I. 1982) (chemicals seeping into water table constitute both public and private nuisance; plaintiff need only prove threatened injury, not actual injury);

has the initial burden of establishing both the defendant's fault in causing the nuisance and the harm suffered by the plaintiff.[183] Once those two points have been established, the plaintiff is well on the way to a successful lawsuit.

VI. Damages and Injunctive Relief

Once the plaintiff has established the defendant's fault in causing the nuisance and the harm suffered by the plaintiff,[184] the plaintiff is entitled to a remedy.[185] The plaintiff may prefer a nuisance remedy over a statutory one because a nuisance action can provide monetary relief to the successful plaintiff,[186] while many statutory actions provide only an injunctive remedy.[187] The primary focus of the new state and federal environmental legislation is to prevent pollution by public regulation rather than by providing damages to injured persons.[188] Compensation of victims of pollution has been incidental to the accomplish-

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see also supra note 172 and accompanying text. *See generally* J. Bonine & T. McGarity, *supra* note 152, at 1007-18 (discussion of causation in common-law nuisance case).

[183] Annotation, *supra* note 134, at 922 (citing Muncie Pulp Co. v. Martin, 23 Ind. App. 558, 55 N.E. 796 (1899)).

[184] See *supra* notes 106-183, and accompanying text.

[185] Annotation, *supra* note 134, at 922-23.

[186] F. Grad, *supra* note 6, § 4A.03, at 4A-197. Mississippi law is clear on the point that monetary damages are appropriate when a landowner's property has been impaired. *See* Masonite Corp. v. Steede, 198 Miss. 530, 547, 23 So. 2d 756, 757 (1945) (failure to prove actual damage for destruction of fishery business did not bar recovery of nominal damages); Masonite Corp. v. Dennis, 175 Miss. 855, 868, 168 So. 613, 616 (1936) (insufficient evidence to justify recovery of damages); Masonite Corp. v. Burnham, 164 Miss. 840, 853, 146 So. 292, 294 (1933) (depreciation in value of land recoverable as damages); Mississippi Mills Co. v. Smith, 69 Miss. 299, 305-06, 11 So. 26, 27 (1892) (plaintiffs were entitled to damages for defendant's enlarged and changed use of stream).

[187] *See, e.g.*, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 21 (1981) (reversing Seventh Circuit and holding that Clean Water Act does not impliedly authorize private cause of action for damages); Reeger v. Mill Serv., Inc., 593 F. Supp. 360, 362-63 (W.D. Pa. 1984) (damages not available under Clean Air Act); *see also* J. Bonine & T. McGarity, *supra* note 152, at 989 (regarding federal environmental legislation: "[t]he courts have uniformly failed to find any authority to award monetary damages under the current citizen suit provisions"); Fisher, *The Availability of Private Remedies for Acid Rain Damage*, 9 Ecology L.Q. 429, 472-86 (1981) (discussing the difficulty of obtaining money damages for acid rain); Note, *Controlling Acid Rain: The Clean Air Act and Federal Common Law Nuisance*, 84 W. Va. L. Rev. 1135, 1155-64 (1982) (discussing abating acid rain under a federal common-law nuisance action).

[188] F. Grad, *supra* note 6, § 4A.03, at 4A-216.

ment of this primary purpose.[189] While this may be an appropriate way to protect the environment, it is not always the most favorable approach for the environmental plaintiff who has been harmed and seeks compensation.

A. *Money Damages*

Damages are aimed at making whole the plaintiff's losses by a money judgment.[190] Damages for temporary injuries from neighboring nuisances generally consist of the reduction of usable or rental value of the property for the time the condition exists,[191] together with special damages,[192] such as loss of business,[193] damage to crops or animals,[194] or damages to structures.[195] If the damage to the plaintiff's property is permanent, the appropriate measure would be the reduction in market value.[196] The court may also consider illness and inconvenience suffered by the owner or the person in possession of the "plain-

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[189] *Id.*

[190] *See* King v. Vicksburg Ry. & Light Co., 88 Miss. 456, 487, 42 So. 204, 205 (1906) (suit based on depreciation in value of land due to noise, smoke, soot, cinders, and vibrations; proper damages held to be "what will make the owner whole pecuniarily for appropriating or injuring his property by any invasion of it cognizable by the senses").

[191] *See* Love Petroleum Co. v. Jones, 205 So. 2d 274, 275 (Miss. 1967) (measuring damages by reduction in rental value is "equitable method" and "is not only a correct measure of damages, but experience has taught us that it is the best method of determining damages for temporary nuisance").

[192] *See* City of Oxford v. Spears, 228 Miss. 433, 439, 87 So. 2d 914, 916 (Miss. 1956) (identifying annoyance, discomfort, inconvenience and sickness as special damages).

[193] *See* City of New Albany v. Slider, 21 Ind. App. 392, 52 N.E. 626, 626-27 (1899) (greatly depreciated value of premises); Wilson v. City of Portland, 153 Or. 679, 58 P.2d 257, 258 (1936) (loss of rental value); Milan v. City of Bethlehem, 372 Pa. 598, 94 A.2d 774, 778 (1953) (diminution in market value of property). *But see* City of Oxford v. Spears, 228 Miss. 433, 439, 87 So. 2d 914, 916 (1956) ("Loss of profits is not the proper measure or element of damage for pollution of a water course").

[194] *See, e.g.*, Fairview Farms, Inc. v. Reynolds Metals Co., 176 F. Supp. 178, 184 (D. Or. 1959) (damage to cattle and milk production). *But see* City of Oxford v. Spears, 228 Miss. 433, 438, 87 So. 2d 914, 916 (1956) (damages deemed not appropriate where evidence, construed in light most favorable to defendant, showed only "a possibility that two or more of appellee's cows died from drinking contaminated water").

[195] *See* Buckeye Cotton Oil Co. v. Ragland, 11 F.2d 231, 234 (5th Cir. 1926) (plaintiff entitled to damages for injury to realty). *See generally* W. RODGERS, *supra* note 11, at 144 (special damages include direct damage to property, crop losses, injury to cattle, and damage to domestic animals).

[196] W. RODGERS, *supra* note 11, at 144.

tiff's land,"[197] because this impairs the quiet enjoyment of the property and depreciates its value.[198]

In *City of Oxford v. Spears*,[199] suit was brought against the city for damages, based upon an alleged nuisance caused by discharging raw sewage into a stream that passed through the plaintiff's land. In assessing damages, the Mississippi Supreme Court stated:

> The measure of damages of the owner of the land is the diminution of the market value of the property if the injury is of a permanent nature, or the diminution in the rental or usable value if the injury is of a temporary nature. Southland Co. v. Aaron, 221 Miss. 59, 72 So. 2d 161 . . . .
>
> In addition, the landowner is entitled to recover such special damages as he may be able to prove. These special or incidental damages are elements of damage separate, distinct, and independent of the depreciation of the value of the property or of the depreciation of the rental or usable value of the property. Included in the category of special or incidental damages are annoyance, discomfort, inconvenience, and sickness. . . . There may be others.[200]

Accordingly, a damage award measured this way should be sufficient to satisfy the aggrieved plaintiff in a nuisance suit.

The plaintiff's right to damages is not restricted to those cases where the plaintiff has suffered personal injuries. In *Phillips v. Davis Timber Co.*,[201] the Mississippi Supreme Court decided that the plaintiff could recover damages, under the doc-

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[197] Applying the nuisance theory to someone other than the owner of the land is sometimes identified as a minor problem. Because of its historical tie with land, much authority would seem to indicate that the cause of action belongs solely to the owner. However, this is clearly not the case. *See* W. RODGERS, *supra* note 11, at 147 ("It is only a question of method or theory, not result, as to whether family members can recover").

[198] *See* Buckeye Cotton Oil Co. v. Ragland, 11 F.2d 231, 234 (5th Cir. 1926) (plaintiff entitled to damages for personal discomfort and physical suffering even though her health was not permanently impaired); City of Louisville v. Hehemann, 162 Ky. 523, 171 S.W. 165, 166 (1914) (property owner allowed to prove sickness and annoyance suffered because his enjoyment was impaired and usable value of his property depreciated).

[199] 228 Miss. 433, 87 So. 2d 914 (1956).

[200] *Spears*, 228 Miss. at 439-40, 97 So. 2d at 916; *see also* Phillips v. Davis Timber Co., 468 So. 2d 72, 78-79 (Miss. 1985) (quoting this passage); Love Petroleum Co. v. Jones 205 So. 2d 274, 275 (Miss. 1967) (and cases cited therein).

[201] 468 So. 2d 72 (Miss. 1985).

trine of nuisance, upon a showing that the defendant polluted the plaintiff's lake.[202] The defendant had argued that the level of pollution was not harmful and that the pollution was therefore not a nuisance. The court rejected this argument and found that an invasion entitles the plaintiff to damages. It is the interference with enjoyment of the land that is crucial, not any personal injury. Thus, the usefulness of the nuisance doctrine is not limited to those cases involving "dangerous" items.

The issue of punitive damages came up in *Laurel Equipment Co. v. Matthews*.[203] The jury in that case awarded the plaintiff actual and punitive damages for injury to vegetation and for obnoxious odors caused by the distribution of paint onto the plaintiff's land. On appeal, the court upheld the award of actual damages, but reversed as to punitive damages because the plaintiff had failed to establish either a willful and intentional wrong or gross negligence.[204] Accordingly, in a case where willful or grossly negligent acts by the defendant led to the nuisance, punitive damages may be available.

B. Injunctive Relief

When the injury to the plaintiff is of a continuing nature, money damages may not be sufficient to correct the wrong,[205] and the plaintiff may seek an injunction either to completely shut down the nuisance, or to impose conditions on the defendant which will lessen the unreasonable interference.[206] The

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[202] *Phillips*, 468 So. 2d at 79. The plaintiff was also awarded injunctive relief. *Id.*

[203] 218 Miss. 718, 67 So. 2d 258 (1953).

[204] *Matthews*, 218 Miss. at 723, 67 So. 2d at 260.

[205] *See, e.g.*, Proby v. State *ex rel.* West, 498 So. 2d 792, 794 (Miss. 1986) (defendant unsuccessfully argued that remedies at law were sufficient and that injunction was not necessary).

[206] *See* Alfred Jacobshagen Co. v. Dockery, 243 Miss. 511, 517-18, 139 So. 2d 632, 634 (1962) (plaintiff could enjoin such future operations that constituted nuisance or permit continuation subject to stated conditions and requirements); Learned v. Hunt, 63 Miss. 373, 379 (1885) (permitting use of canal to extent that such use did not infringe on rights of plaintiff); *see also* Weinberger v. Romero-Barcelo, 456 U.S. 305, 328 (1982) (Stevens, J., dissenting) (referring to "garden variety private nuisance action" where "the chancellor has the widest discretion in fashioning relief"). In certain cases, self-help remedies may be appropriate, if they can be accomplished without a breach of the peace. *See e.g.*, Lindsey v. Shaw, 210 Miss. 333, 339-40, 49 So. 2d 580, 584 (1950) (where trees had grown over easement and constituted private nuisance, easement owner could cut down

plaintiff may be entitled to injunctive relief even before any actual injury has been suffered.[207] The traditional approach to injunctive relief is set forth in *Shattles v. Field, Brackett & Pitts, Inc.*,[208] where the Mississippi Supreme Court stated:

> The general rule is that a landowner is entitled to an injunction directing the removal of a trespassing structure on his land . . . The facts that the aggrieved owner suffers little or no damage from the trespass, that the wrongdoer acted in good faith and would be put to disproportionate expense by the removal of the trespassing structures, and that neighborly conduct as well as business judgment would require acceptance of compensation in money for the lands appropriated, are ordinarily no reasons for denying an injunction. Rights in real property cannot ordinarily be taken from the owner at valuation, except under power of eminent domain. Only when there is some estoppel or laches on the part of the plaintiff, or a refusal on his part to consent to acts necessary to the removal or abatement which he demands, will an injunction ordinarily be refused.[209]

This traditional approach, while still valid in Mississippi,[210] has come under some recent attack. "It goes without saying that an injunction is an equitable remedy. It 'is not a remedy which issues as of course.' "[211] Mississippi courts are free to "adjust the

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trees without becoming trespasser).

[207] *See* Gulf Park Water Co. v. First Ocean Springs Dev. Co., 530 So. 2d 1325, 1334 (Miss. 1988) ("an injunction will be available, despite the absence of demonstrable harm, to prevent a trespass or abate a nuisance"); *see also* Village of Wilsonville v. SCA Servs., Inc., 86 Ill. 2d 1, 426 N.E.2d 824, 833-34 (1981) (equitable relief can be based on threatened rather than actual harm); Wood v. Picillo, 443 A.2d 1244, 1247-48 (R.I. 1982) (chemicals seeping into water table constitute both public and private nuisance; plaintiff need only prove threatened injury, not actual injury). *See generally* J. BONINE & T. MCGARITY, *supra* note 152, at 1007-18 (lesser causation requirement evolving in recent common-law nuisance actions).

[208] 261 So. 2d 795 (Miss. 1976).

[209] *Shattles*, 261 So. 2d at 797-98 (citing Turner v. Morris, 196 Miss. 297, 17 So. 2d 205, 207 (1944)); *see also* Phillips v. Davis Timber Co., 468 So. 2d 72, 79 (Miss. 1985) (nuisance case quoting this portion of *Shattles*).

[210] *See* Phillips v. Davis Timber Co., 468 So. 2d 72, 79 (Miss. 1985) (nuisance case quoting this portion of *Shattles*, but holding that plaintiff had not proved facts sufficient to support injunctive relief).

[211] Weinberger v. Romero-Barcelo, 456 U.S. 305, 311 (1982) (quoting Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334, 337-38 (1933)).

remedy to the need."[212] Thus, if the harm can be minimized without completely shutting down the defendant's operations, at least for a period of time sufficient to permit the defendant to attempt to correct the problem, that remedy would be appropriate.[213]

Perhaps the well known environmental nuisance suit, *Boomer v. Atlantic Cement Co.*,[214] best illustrates this newer line of thought. In that case, neighbors of a large cement plant brought action for injunctions, alleging injury to property from dirt, smoke, and vibration emanating from the plant. At trial, the plant was held to constitute a nuisance, but the injunction request was denied. The court of appeals first noted the traditional rule that "where a nuisance has been found and where there has been any substantial damage shown by the party complaining an injunction will be granted."[215] The court ultimately declined to enter an injunction, however. After noting that "to follow the rule literally in these cases would be to close down the plant at once,"[216] the court instead awarded the payment of permanent damages to the plaintiffs.[217] Dissenting Judge Jasen pointed out that this remedy, in essence, gave the defendant power to condemn adjoining properties.[218]

In fashioning this remedy, the *Boomer* court was obviously aware of the hardship an injunction would cause the defendant. It noted that the dust problem was "universal wherever cement is made,"[219] implying that it would be too much to ask this one

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[212] Alfred Jacobshagen Co. v. Dockery, 243 Miss. 511, 518, 139 So. 2d 632, 634 (1962).

[213] *Id.*

[214] 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

[215] *Boomer*, 26 N.Y.S.2d at 223, 257 N.E.2d at 872, 309 N.Y.S.2d at 315.

[216] *Id.* at 225, 257 N.E.2d at 873, 309 N.Y.S.2d at 316; *see also* Sommers v. City of Detroit, 284 Mich. 67, 278 N.W. 767, 769-70 (1938) (property owners not entitled to enjoin garbage incineration).

[217] *Boomer*, 26 N.Y.2d at 228, 257 N.E.2d at 875, 309 N.Y.S.2d at 319; *see also* Alfred Jacobshagen Co. v. Dockery, 243 Miss. 511, 516, 518, 139 So. 2d 632, 633-34 (1962) (court declined to issue injunction, instead ordering damages and giving defendant six months to improve nuisance).

[218] *Boomer*, 26 N.Y.2d at 230, 257 N.E.2d at 876, 309 N.Y.S.2d at 321 (Jasen, J., dissenting).

[219] *Id.* at 226, 257 N.E.2d at 873, 309 N.Y.S.2d at 317; *see also* City of Chicago v. Commonwealth Edison Co., 24 Ill. App. 3d 624, 321 N.E.2d 412, 419 (App. Ct. 1974)

plant to solve the problems plaguing an industry. Although it was not discussed to any great extent in the appellate opinion, the main reason that the trial judge had declined to issue an injunction was not undue hardship to the defendant, but rather the important role that the plant played in the local economy.[220] The modern approach to injunctive remedies in nuisance cases, as reflected in *Boomer*, comes down to a balancing of the equities.[221] Factors such as good faith,[222] technological feasibility, and importance of the activity to the local economy all play an important part in that process.[223] The plaintiff can, however, have an impact on this balancing. For instance, in the case of *Renken v. Harvey Aluminum, Inc.*,[224] plaintiffs sought to have the defendant better control gases that were escaping from its aluminum plant. The plant was using certain hoods to trap the gases, but approximately twenty percent of the gases were escaping. The plant was a major employer in the area, and the new equipment would be expensive; but the plaintiff established that

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(refusing to enjoin power company's operations).

[220] R. FINDLEY & D. FARBER, ENVIRONMENT LAW, CASES AND MATERIALS 13 (2d ed. Supp. 1988). Ultimately the cement company paid a total of $710,000 in damages and settlement of cases. *Id.* The *Boomer* case has been subjected to much scholarly criticism. *See, e.g.*, Farber, *Reassessing Boomer: Justice, Efficiency, and Nuisance Law*, in ESSAYS ON THE LAW OF PROPERTY AND LEGAL EDUCATION, IN HONOR OF JOHN E. CRIBBETT 7-25 (M. Hoeflich & P. Hay ed. 1988) (discussing *Boomer* and remedies in nuisance case). In fact, *Boomer* was brought to Congress' attention during consideration of the Clean Air Act. *See* Bonine, *The Evolution of "Technology Forcing" in the Clean Air Act*, 6 ENV'T REP. (BNA) Monograph No. 21 (July 25, 1975) (discussing Congress' role in developing technology forcing stance of Act), *reprinted in* J. BONINE & T. MCGARITY, *supra* note 152, at 280-85. The Clean Air Act is codified at 42 U.S.C. §§ 7401-7642 (1983). Congress in enacting the Clean Air Act, however, chose not to follow *Boomer*'s reasoning. Thus, the Clean Air Act is "technology forcing." Union Elec. Co. v. EPA, 427 U.S. 246, 269 (1976). To argue that the means are beyond the currently available technology is not a defense to a claim brought under the Act. *Id.* at 268-69.

[221] *See* W. PROSSER & W. KEETON, *supra* note 2, at 632 (grant equitable remedy of injunctive relief when gravity of harm from activity exceeds utility of conduct); *see also* Alfred Jacobshagen Co. v. Dockery, 243 Miss. 511, 518, 139 So. 2d 632, 634 (1962) (approving trial court's balancing of equities).

[222] McElwain v. Georgia-Pacific Corp., 245 Or. 247, 421 P.2d 957, 958 (1966) (holding punitive damages available where defendant did not evidence good faith in operation of its paper mill).

[223] *See, e.g.*, Reserve Mining Co. v. EPA, 514 F.2d 492, 535-42 (8th Cir. 1975) (en banc).

[224] 226 F. Supp. 169 (D. Or. 1963).

other aluminum plants in the country were using the more advanced process. Since there was an injunctive remedy available that stopped short of closing down the plant, the court ordered installation of the better hoods. This better process was technologically feasible, and the cost was not prohibitive.[225]

The lesson to be derived from these cases, then, is that the environmental plaintiff who is seeking injunctive relief under a nuisance theory should be aware that the court may balance the equities before granting injunctive relief. If the defendant's activities are important to the local economy, or if there are other justifications for the defendant's actions, injunctive relief may not be available. However, if the plaintiff is aware of a way for the defendant to carry on its activities without continuing the nuisance,[226] that information should be brought to the attention of the court, because the defendant may be ordered to use this less offensive procedure. While application of the traditional test will normally be most favorable to the plaintiff, the plaintiff can obtain a very favorable decision under the newer test by careful advance planning.

VII. Defenses to Nuisance

As noted above, one of the greatest advantages for the environmental plaintiff in using common-law nuisance is that once the elements are established, the plaintiff is entitled to a remedy. There are few successful defenses once the plaintiff has established a nuisance. Regardless of whether the defendant has used the utmost care, cannot possibly do better, or is required to continue polluting by the usefulness of its work, the right to recover for a private nuisance cannot be denied.[227] Holding a per-

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[225] *Renken*, 226 F. Supp. at 171-72. The actual basis under which this suit was brought was "continuing trespass," but the court noted that a nuisance suit would also have been appropriate. *Id.* at 175.

[226] Among the possibilities to be considered are "defensive measures" that might be made to the plaintiff's land, at the defendant's expense. W. Rodgers, *supra* note 11, at 148. Thus, matters such as soundproofing or defensive landscaping might be suggested to the court. *Id.*

[227] *See* King v. Vicksburg Ry. & Light Co., 88 Miss. 456, 485, 488, 42 So. 204, 204-05 (1906) (suit based on depreciation in value of land due to noise, smoke, soot, cinders, and vibrations; court held that even though defendant's "machinery is of the best kind, its employees [sic] skillful and careful, and its management above criticism," issue of liabil-

mit for operation of the alleged nuisance does not constitute a defense against a nuisance action.[228] Nor will compliance with zoning laws shield the defendant from a nuisance suit.[229] In theory, where the nuisance develops without the defendants's knowledge, the doctrine of contributory negligence could apply, but such a case would be very unlikely to arise.[230] Other doctrines appear to offer even less comfort to the polluter.

A defendant might claim a prescriptive right, if the plaintiff had knowingly acquiesced to the nuisance for a lengthy period of time.[231] Two factors make this very unlikely, however. First, the

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ity should have been put to jury); *see also* W. PROSSER & W. KEETON, *supra* note 2, at 629 (although exercising utmost care, may be required to pay for inevitable harm to neighbors); Annotation, *supra* note 134, at 922-23 (when nuisance is established by plaintiff, right to recovery cannot be defeated; highest degree of care and skill will be no excuse). Moreover, the remedy should not be delayed. *See* Board of Health v. Copcutt, 140 N.Y. 12, 21, 35 N.E. 443, 445 (1893) (public authorities "ought not to wait until some citizen is sick or dead before they prevent or abate the nuisance causing the injurious result").

[228] *See* King v. Vicksburg Ry. & Light Co., 88 Miss. 456, 485, 42 So. 204, 204 (1906) (defendant's claim of exemption from liability due to operation under "public authority" rejected by court); *see also* Heinl v. Pecher, 330 Pa. 232, 198 A. 797, 800 (1938) (noting that operation of incinerator would be nuisance, regardless of compliance with any zoning ordinance). Although it is well established that a permit, or compliance with regulations, will not shield the defendant from an action for a private nuisance, whether the same can be said as to public nuisance suits is somewhat unclear. F. GRAD, *supra* note 6, § 4A.03, at 4A-200. *But see* Town of Mount Pleasant v. Van Tassell, 7 Misc. 2d 643, 166 N.Y.S.2d 458, 461 (Sup. Ct. 1957) (operation of piggery found to be public nuisance despite legality of operation), *aff'd*, 6 A.D.2d 880, 177 N.Y.S.2d 1010 (App. Div. 1958).

[229] State v. Waterloo Stock Car Raceway, Inc., 96 Misc. 2d 350, 409 N.Y.S.2d 40, 44-45 (Sup. Ct. 1978).

[230] *See supra* notes 108-18 and accompanying text (discussing contributory negligence in context of nuisance action). In addition, if such a case were to arise, it would seem to conflict with the general rule that a party can not be contributorily negligent in maintaining his own property. W. RODGERS, *supra* note 11, at 134.

[231] In Mississippi, the applicable period of time would apparently be 10 years. *See* City of Oxford v. Spears, 228 Miss. 433, 440, 87 So. 2d 914, 917 (1956) (reversing trial court's instruction that city could obtain prescriptive right after 10 years, because in Mississippi city can not obtain prescriptive right to maintain nuisance); Lindsey v. Shaw, 210 Miss. 333, 337, 49 So. 2d 580, 583 (1950) (10 year period required to acquire easement); *see also* Cook Indus., Inc. v. Carlson, 334 F. Supp. 809, 818 (N.D. Miss. 1971) (private nuisance must have occurred in same manner with equally injurious results throughout period to obtain right by prescription); Vicksburg Chem. Co. v. Thornell, 355 So. 2d 299, 301 (Miss. 1978) (trial court properly refused to instruct on prescriptive right due to tolling). There is, however, an exception in the case of agricultural uses, which are entitled to a prescriptive right after being in place for one year. MISS. CODE ANN. § 95-3-29 (Supp. 1989).

plaintiff would have had to knowingly condone, for a very long period of time, a condition about which he surely would have objected. Additionally, the condition would have had to continue at the same level for that period of time. If there had been an increase in the intensity of the nuisance, the period would begin running anew.[232] Moreover, in Mississippi, municipal defendants can not obtain prescriptive rights to maintain a nuisance.[233] It would be a rare case indeed when the defendant could successfully plead this defense.[234]

The defense of laches might also be raised by environmental defendants. Laches, however, is a creature of equity and "does not hold great doctrinal promise for those who claim they should be allowed to take another's property without compensation."[235] Courts ruling on environmental matters have not, in general, looked favorably on this defense.[236] While the environmental plaintiff should take care not to "sit on his rights," laches should not pose a significant problem in most cases.

Defendants also may argue that the plaintiff has "come to the nuisance."[237] This argument stems from the old legal axiom that he who voluntarily places himself in a situation whereby he

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[232] *See* Vicksburg Chem. Co. v. Thornell, 355 So. 2d 299, 301 (Miss. 1978) (trial court properly refused to instruct on prescriptive right because of tolling). *See generally* W. RODGERS, *supra* note 11, at 135 (annoyance must have continued with unabated intensity for entire period because change in degree of effluent alone sufficient to break prescription).

[233] *See* City of Oxford v. Spears, 228 Miss. 433, 440, 87 So. 2d 914, 917 (1956) (reversing trial court's instruction that city could obtain prescriptive right); City of Meridian v. Tingle, 226 Miss. 317, 322, 84 So. 2d 388, 390 (1956) (instructions on whether city had acquired prescriptive right in creek for sewage was erroneous to establish city's right to do so).

[234] One exception to this rule is the case of an agricultural use of land. A Mississippi statute provides that an agricultural use of land can not be declared a nuisance after it has been in place for one year. *See* MISS. CODE ANN. § 95-3-29 (Supp. 1989) (agricultural operation existing for one year is absolute defense to public or private nuisance).

[235] W. RODGERS, *supra* note 11, at 135.

[236] *See, e.g.*, Ecology Center v. Coleman, 515 F.2d 860, 867-68 (5th Cir. 1975) (court refused to apply laches as defenses); Steubing v. Brinegar, 511 F.2d 489, 494-96 (2d Cir. 1975) (same).

[237] *See* Buckeye Cotton Oil Co. v. Ragland, 11 F.2d 231, 234 (5th Cir. 1926) (defense of coming to nuisance denied because defendant was not located in exclusively manufacturing district).

suffers injury will not prevail.[238] An example would be where the plaintiff has purchased a home near a factory that he now claims is a nuisance. The majority rule is that this will not bar the plaintiff from asserting a nuisance cause of action for the continued use or operation.[239] This rule is based on the theory that pure air and comfortable enjoyment of property are as much rights belonging to the owner as the right of possession and occupancy.[240] In those jurisdictions that allow this defense, the crucial question is whether the plaintiff was aware of the nuisance when he "came to it."[241]

A defendant might also try to avoid liability by shifting blame to a prior owner of the nuisance. In the case of a private nuisance, "the familiar principle of caveat emptor dictates that responsibility for the offending condition is transferred between parties to the sale of land on which it exists."[242] Thus, the owner will not be able to assert this defense successfully.[243] If a party

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[238] ENVIRONMENTAL LAW HANDBOOK, *supra* note 17, § 6.1.5, at 15.

[239] *See* Annotation, *"Coming To Nuisance" As A Defense or Estoppel*, 42 A.L.R.3d 344, 347-57 (1972) (discussing rules concerning "coming to nuisance" defense); *see also* W. RODGERS, *supra* note 11, at 132-33 (defense of "coming to nuisance" gives defendant prescriptive right or easement against new property owner when defendant has paid nothing; large number of cases reject this defense). Where, however, the defendant "came to" the site, the court may view this as an additional reason for enjoining the nuisance. *See, e.g.*, Village of Wilsonville v. SCA Servs., Inc., 86 Ill. 2d 1, 426 N.E.2d 824, 833-34 (1981) (nuisance came to village; court views this as "additional reason[s] why defendant's conduct is inequitable and why plaintiffs are entitled to a permanent injunction").

[240] ENVIRONMENTAL LAW HANDBOOK, *supra* note 17, § 6.1.5, at 15.

[241] *Id. See generally* W. PROSSER & W. KEETON, *supra* note 2, at 634-35 (discussing defense of plaintiff coming to nuisance). The purpose of this inquiry is to prevent the plaintiff from unfairly purchasing property at a deflated price (because of the nuisance) and then seeking to reap a windfall by suing on the nuisance. *Id.*

[242] Halper, *supra* note 15, at 10048. "[I]n private nuisance, sale of land generally *does* shift liability." *Id.* at 10047.

[243] The principle of transferred liability rests on the assumption that there has been no fraud on the part of the seller. *Id.* at 10048 (citing Philadelphia Elec. Co. v. Hercules, Ltd., 762 F.2d 303, 314 (3d Cir. 1985)). The underlying theory is that the buyer was aware of the nuisance and therefore bargained for a lower price. *Id.* If the defendant's property constitutes a nuisance, the defendant is responsible, even if the defendant was not responsible for the creation of the condition in the first place. *See* King v. Vicksburg Ry. & Light Co., 88 Miss. 456, 488, 42 So. 204, 205 (1906) ("If the damage to the plaintiff's property was not caused by the plant of the defendant since it acquired it, but before, and there has been no continuing cause of damage, whereby depreciation of value has been maintained, there is no liability on it; but if damage was done during former

has created a *public* nuisance on certain property, and that property has since been turned over to and accepted by a new party, not only may the new party find itself liable for continuing to operate a public nuisance, but the original owner can also be held responsible for having created it.[244]

In any event, it is obvious that the defendant accused of operating an environmental nuisance has little in the way of defenses to that charge. He must instead concentrate on defeating the plaintiff's claim. This places the environmental plaintiff in a very strong position. If the plaintiff can prevail on his theory, it is unlikely that an affirmative defense will excuse the defendant.[245]

VIII. Conclusion

Common-law private nuisance actions still provide a viable alternative to the environmental plaintiff seeking to correct an environmental wrong. In many cases a nuisance action provides procedural and substantive advantages to the plaintiff. The action can stand on its own or be appended to a complaint containing counts based on federal legislation. There is no serious question as to federal preemption of state common-law actions. The main issue to be resolved is whether the defendant has interfered with the plaintiff's enjoyment of his property. If this interference is established, and the plaintiff avoids common causation problems, the defendant has little in the way of affirmative defenses to relieve himself from liability. The plaintiff

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ownership, and the cause is continued, whereby restoration of value has been prevented, the fact of the former damage would not avail the defendant"); F. Grad, *supra* note 6, § 4A.03, at 4A-197 (citing Ayers v. Township of Jackson, 202 N.J. Super. 106, 493 A.2d 1314 (App. Div. 1985)).

[244] Price v. United States, 530 F. Supp. 1010, 1016 (S.D. Miss. 1981) (discussing Schumacher v. Carl G. Neumann Dredging & Improvement Co., 206 Wis. 220, 239 N.W. 459, 460 (1931), *overruled in part*, 112 N.W.2d 705, 708 (Wis. 1961); State v. Ole Olsen, Inc., 35 N.Y.2d 979, 324 N.E.2d 886, 365 N.Y.S.2d 528 (1975)); *cf.* Gwaltney v. Chesapeak Bay Found., 484 U.S. 49, 64 (1987) (Clean Water Act not available for wholly past violations); Ascon Properties, Inc. v. Mobile Oil Co., 866 F.2d 1149, 1159 (1989) (Resource Conservation and Recovery Act not available for wholly past violations).

[245] Thus, the plaintiff will be entitled to some remedy, but the plaintiff might not be able to completely abate the nuisance. *See supra* notes 214-220 and accompanying text (discussion of remedies for plaintiff in *Boomer* case).

should be able to recover money damages, and in many cases, he will be entitled to injunctive relief as well. A common-law private nuisance action is an alternative that should be considered in every environmental case.

LIABILITY INSURANCE COVERAGE FOR POLLUTION CLAIMS

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Are Mississippi policyholders protected by their liability insurance policies for claims made against them because of envi-

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ronmental damages?

I. INTRODUCTION—POLICYHOLDERS' EXPECTATIONS

Since the primary purpose of insurance is to insure, Mississippi policyholders should expect to be covered by liability insurance when environmental claims are made against them.[1] One commentator has suggested that businesses purchasing comprehensive general liability (CGL) policies or excess liability, including umbrella policies, should expect to be both defended and indemnified in actions under environmental statutes and regulations.[2] This conclusion is supported by other authors, some of whom have stated that once a policyholder has been identified by the government as a potentially responsible party (PRP) for an environmental violation, the policyholder is likely to look to its insurance company for a defense against the government's claims as well as for indemnification of the cleanup costs.[3]

The State of Mississippi has long recognized its role and responsibilities in monitoring the insurance industry in the state.[4] For example, in *State v. Alley*,[5] the Mississippi Supreme Court ruled that "[t]he right of a state to regulate the business of insurance is so well settled that it needs no citation of authority."[6] The court further stated that it would be a goal of the public policy of Mississippi "to make insurance safe, as well as cheap."[7]

Further discussion of the public policy of Mississippi was

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[1] 13 J. APPLEMAN, INSURANCE LAW & PRACTICE WITH FORMS § 7403, at 302-03 (1976).

[2] McCall, *Insurance Coverage for Environmental Liabilities*, 77 ILL. B.J. 546, 548 (1989). The commentator then noted that these expectations are frequently dashed because the insurance companies often deny such responsibilities under environmental claims. *Id.*

[3] Crisham & Davis, *CGL Coverage for Hazardous Substances Clean-Up*, FOR DEF., Mar. 1988, at 21. The authors are members of the firm of Hinshaw, Culbertson, Hoban & Fuller, one of the leading firms in the United States in the representation of insurance companies in disputes with their policyholders.

[4] New York Life Ins. Co. v. Boling, 177 Miss. 172, 188, 169 So. 882, 883 (1936); Central Accident, Fire & Life Assurance Co. v. Walker, 99 Miss. 404, 408-09, 55 So. 51, 51 (1911).

[5] 96 Miss. 720, 51 So. 467 (1910).

[6] *Alley*, 96 Miss. at 763, 51 So. at 476.

[7] *Id.* at 766, 51 So. at 477.

provided in *Travelers Indemnity Co. v. Watkins*,[8] a decision in which the court noted that since the availability and coverage of insurance policies was sufficiently associated with the public interest, the insurance industry was therefore quasi-public in nature.[9] The court, which was considering the policy goals of the Motor Vehicle Safety Responsibility Act and the Uninsured Motor Vehicle Act, indicated that the acts were intended not only to protect the persons named in a policy, but also to afford some protection to other unnamed persons who have been injured by careless drivers.[10] In sum, the court interpreted the acts as evidencing a legislative intent to protect the public and to provide coverage to those persons who are injured on Mississippi highways; therefore, the rule should be one of liberal construction of insurance contract provisions so that the public interest contemplated by the policy goals of the acts can be safeguarded.[11]

Given Mississippi's policy goal of protecting the public, and in light of the history of liability insurance coverage, as more fully discussed hereinafter, Mississippi policyholders have good reason to expect that environmental claims will be covered by their CGL policies.[12]

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[8] 209 So. 2d 630 (Miss. 1968).

[9] *Travelers Indem. Co.*, 209 So. 2d at 632.

[10] *Id.*

[11] *Id.* at 634.

[12] It is not a novel concept that the public interest, as indicated by the public policy goals of the states, necessarily makes the insurance industry a quasi-public entity that is therefore subject to those limitations that are necessary to protect the public interest. For example, more than 50 years ago Dean Roscoe Pound wrote:

> [W]e have taken the law of insurance practically out of the category of contract, and we have established that the duties of public service companies are not contractual, as the nineteenth century sought to make them, but are instead relational; they do not flow from agreements which the public servant may make as he chooses, they flow from the calling in which he has engaged and his consequent relation to the public.

R. POUND, THE SPIRIT OF THE COMMON LAW 29 (1931).

Moreover, while considering the McCarran-Ferguson Act, Pub. L. No. 15, 59 Stat. 33 (1945) (codified at 15 U.S.C. §§ 1011-1015 (1982)), the Congress noted that the states' regulation of the insurance industry was in the public interest. *See* H.R. REP. No. 143, 79th Cong., 1st Sess. (1945), *reprinted in* 1945 U.S. CODE CONG. & ADMIN. NEWS 670, 672 (noting states' interest).

The concept of insurance companies as special entities engaged in a business intertwined with an overwhelming public interest has been explicitly acknowledged by the courts. *See, e.g.*, German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 414 (1914) (all insur-

II. Coverage Under Comprehensive General Liability Policies

Liability insurance, one of the oldest and most common

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ance contracts are interdependent, creating "fund of assurance and credit"; imposing such construction is justified by insurance companies' position of public trust and responsibility stemming from their economic power); Andrew J. Corsa & Son, Inc. v. Harnett, 92 Misc. 2d 569, 400 N.Y.S. 1009, 1011 (Sup. Ct. 1977) (insurance industry affects public interest); Abramson v. Kenwood Laboratories, Inc., 223 N.Y.S.2d 1005, 1007 (Sup. Ct. 1961) (insurance companies are bound by public interest), *rev'd on other grounds*, 17 A.D.2d 626, 230 N.Y.S.2d 247 (App. Div. 1962). Such an approach is suggested by decisions of the Mississippi Supreme Court. *E.g., Travelers Indem. Co.*, 209 So. 2d at 632 (insurance contracts to be construed to protect public interest).

One result of this jurisprudence is the imposition of fiduciary responsibilities upon the insurance companies since they hold considerable power over their policyholders and the nation's commerce. Shultz Steel Co. v. Rowan-Wilson, Inc., 187 Cal. App. 3d 513, 519, 231 Cal. Rptr. 715, 717-18 (2d Dist. 1986). This approach became necessary because of attempts by insurance companies to draft contracts carefully so as to make the exceptions to coverage "unfairly devour the whole policy." Berliner v. Travelers Ins. Co., 121 Cal. 458, 460-61, 53 P. 918, 920 (1909) (quoting Equitable Accident Ins. Co. v. Osborn, 90 Ala. 201, 207, 9 So. 869, 870 (1890)). The policyholder merely adheres to the contract drawn by the insurance company and has little choice as to its terms. Insurance policies are contracts of adhesion. Patterson, *The Delivery of a Life Insurance Policy*, 33 Harv. L. Rev. 198, 222 (1919); *see also* Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co., 218 N.J. Super. 516, 523-24, 528 A.2d 76, 80 (1987) (insurance contracts are prepared by companies' experts and therefore are not between parties equally situated); Mazzilli v. Accident & Casualty Ins. Co., 35 N.J. 1, 7, 170 A.2d 800, 804 (1961) (same). Policyholders have the right to rely on the terms of the policy and not run the risk of losing the coverage they paid for when the insurance company "run[s] for cover rather than coverage." Sandoz, Inc. v. Employer's Liab. Assurance Corp., 554 F. Supp. 257, 258 (D.N.J. 1983).

With such significant testaments to the special status that insurance companies enjoy, even their spokespersons have articulated the role of their companies as public trustees inextricably intertwined with the interests of policyholders and with the broad public interest. Thus, for example, the chairman of Berkshire Hathaway, the corporate parent of several insurance companies, stated in a letter to shareholders:

> The buyer of insurance receives only a promise in exchange for his cash. The value of that promise should be appraised against the possibility of adversity, not prosperity. At a minimum, the promise should appear able to withstand a prolonged combination of depressed financial markets and exceptionally unfavorable underwriting results.

Letter from Warner E. Buffett, Chairman of the Board of Berkshire Hathaway, to Shareholders 35 (Feb. 25, 1985).

In 1981, the American Insurance Association exhibited a public-spirited face with these words:

> Insurance leaders are fond of saying, without exaggeration, that the insurance industry is imbued with the public interest—that insurance is essential to commercial activity and necessary to daily living. We focus the spotlight on ourselves. We convince others of the leading role insurance plays in society. We

forms of insurance, covers the risk that the policyholder will be subject to legal liability.[13] Whenever there is an attempt to impose legal liability upon the policyholder because of bodily injury or property damage, liability insurance provides coverage unless a specific exclusion applies.[14] In general, liability insurance covers indemnification, as well as the costs of the early stages of the litigation process, including investigation and defense.[15]

Standard form comprehensive general liability insurance is legal liability insurance, protecting tortfeasors and providing coverage for litigation expenses and "damages."[16] Therefore, liability insurance has been essential to the development of our agricultural and industrial economy, providing economic stability to farms, businesses, and industries by shifting the risk of potentially economically devastating liability from the policyholder to the insurance company.[17] Because it protects these vital economic institutions, liability insurance protects more than the policyholder: it also protects these institutions' customers, neighbors, employees, owners, and creditors, as well as the public.[18] As one commentator observed in a recent article, "to buy or not to buy insurance is no longer a private option."[19]

A. Case Law

There are no Mississippi cases dealing with insurance coverage for environmental claims. A collection of the cases from

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encourage them to expect superior performance from us.
The Burgeoning of Litigation, Proceedings of American Ins. Assoc. Annual Meeting 62 (May 28-29, 1981).

[13] Note, *Liability Coverage for "Damages Because of Property Damage" Under the Comprehensive General Liability Policy*, 68 MINN. L. REV. 795, 795 n.1 (1984).

[14] The standard form policy covers "all sums which the [policyholder] shall become legally obligated to pay as damages because of bodily injury or property damage." S. MILLER & P. LEFEBVRE, MILLER'S STANDARD INSURANCE POLICIES ANNOTATED 411 (1988). The above language was used from 1966 to 1985. *Id.*

[15] *See infra* notes 158-83 and accompanying text (discussing indemnification, investigation, and defense).

[16] *Id.*

[17] Note, *supra* note 13, at 795-96.

[18] *Id.*

[19] McAlear, *The Emperor's Old Clothes*, BEST'S REV., Feb. 1989, at 22.

other jurisdictions, which are evenly divided, is contained in *Claussen v. Aetna Casualty & Surety Co.*,[20] in the third written opinion in the case (*Claussen III*).[21]

The differing interpretations by the courts of the same standard form CGL policy language should, in and of itself, be sufficient for the Mississippi courts to conclude that the policies are ambiguous. Therefore, under basic principles of contract construction, CGL policies should be construed to cover a policyholder's liability for environmental claims.[22]

Mississippi adheres to the basic principles of insurance contract construction, the state supreme court repeatedly holding that, "[i]f [the language of an insurance policy is] ambiguous, it should be construed most strongly in favor of the insured."[23] Mississippi courts have gone so far as to say that "the insurer

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[20] 865 F.2d 1217 (11th Cir. 1989).

[21] *Id.* at 1219. The Georgia Supreme Court then issued a written opinion in response to a certified question from the Eleventh Circuit. Claussen v. Aetna Casualty & Sur. Co., 259 Ga. 333, 380 S.E.2d 686 (1989) (*Claussen IV*). The earlier district court opinions can be found at 676 F. Supp. 1571 (S.D. Ga. 1987) (*Claussen I & II*). The last opinion by the Eleventh Circuit is at 888 F.2d 747 (11th Cir. 1989) (*Claussen V*). Another collection of the cases on both sides of the issue appears in a recent brief of United States Fidelity & Guaranty Company filed with the Supreme Court of Illinois. Brief on Petition for Leave to Appeal at 10, United States Fidelity & Guar. Co. v. Specialty Coatings Co., 180 Ill. App. 3d 378, 535 N.E.2d 1071, *rev. denied*, 136 Ill. 2d 609, 545 N.E.2d 133 (1989).

[22] *See* Annotation, *Division of Opinion Among Judges on Same Court or Among Other Courts or Jurisdictions Considering Same Question, As Evidence That Particular Clause of Insurance Policy Is Ambiguous*, 4 A.L.R.4th 1253, 1255 (1981) (split of authority indicates ambiguity); *see also* 2 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 15.84, at 419 (2d. ed. 1984) (noting courts' inability to discern unitary interpretation). As this split necessarily indicates, although the policyholder was successful in *Claussen*, success in not guaranteed. *See* Hicks v. American Resources Ins. Co., 544 So. 2d 952, 953 (Ala. 1989) (denying coverage).

[23] Griffin v. Maryland Casualty Co., 213 Miss. 624, 631, 57 So. 2d 486, 489 (1952); *see also* Lumbermen's Mut. Casualty Ins. Co. v. Randle, 370 F.2d 68, 72 (5th Cir. 1966) (construed ambiguity in favor of insured); Brander v. Nabors, 443 F. Supp. 764, 769 (N.D. Miss.) (if there are two or more possible constructions, court adopts construction giving most coverage), *aff'd*, 578 F.2d 888 (5th Cir. 1978); America Southwest Corp. v. Underwriters at Lloyds, London, 333 F. Supp. 1333, 1337 (S.D. Miss. 1971) (construed insurance contract against drafter); Cruse v. Aetna Life Ins. Co., 369 So. 2d 762, 764 (Miss. 1979) (construed contract against insurance company); Williams v. Life Ins. Co., 367 So. 2d 922, 925 (Miss. 1979) (construed ambiguity in favor of policyholder); Bellefonte Ins. Co. v. Griffin, 358 So. 2d 387, 390 (Miss. 1978) (resolved ambiguity in favor of policyholder); Monarch Ins. Co. v. Cook, 336 So. 2d 738, 741 (Miss. 1976) (adopted construction that favors indemnity); Great Am. Ins. Co. v. Bass, 208 Miss. 436, 439, 44 So. 2d 532, 533 (1950) (resolved ambiguity in favor of policyholder).

could gain no comfort from indefinite, uncertain and ambiguous language because the rule is that any ambiguity in the language of the policy will be construed more strictly against the writer of the policy."[24] The reason for this rule of construction "is so . . . that the purpose of the policy will not be defeated."[25] *Aerial Agricultural Service v. Till*[26] summarized the position of the Mississippi courts in construing ambiguous language in insurance policies as follows: Since insurance policies are contracts of adhesion, Mississippi will follow the rule universally applied in such a situation, namely, liberally construing the policy in favor of the policyholder.[27]

Just as the cases on coverage for environmental damage claims are irreconcilably split, so are the authors of various current articles, thereby giving further weight to the argument that the CGL policies' wording is ambiguous and that the policies should therefore be construed in the policyholders' favor.[28]

Another basic principle of construction is that insurance policies are to be construed in light of the circumstances in which they were issued and according to common usages and understandings.[29] That is to say, "[a] policy must be construed in the light of its purposes and the hazards against which it was designed to protect."[30] Furthermore, as a Mississippi court has explained:

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[24] *America Southwest Corp.*, 333 F. Supp. at 1338 (quoting Home Owners Ins. Co. v. Keith's Breeder Farms, Inc., 227 So. 2d 293, 295-296 (Miss. 1969)).

[25] *Bellefonte Ins. Co.*, 358 So. 2d at 390.

[26] 207 F. Supp. 50 (N.D. Miss. 1962).

[27] *Till*, 207 F. Supp. at 57.

[28] For contrasting views of the insurance coverage available to policyholders, compare Anderson & Luppi, *Environmental Risk Insurance: You Can Count on It*, RISK MANAGEMENT, Oct. 1987, at 68 with Jernberg & Furse, *Environmental Risk Insurance: Don't Count on It*, RISK MANAGEMENT, July 1987, at 42; *see also* Russell, Schaufelberger & Nessman, *Lawyers Say Insureds Are Attempting To Reinvent History*, MEALEY'S LIT. REP.—INS., Mar. 23, 1988, at 29-36 (arguing against coverage); Sayler & Zolensky, *Pollution Coverage and the Intent of the CGL Drafters: The Effect of Living Backwards*, MEALEY'S LIT. REP.—INS., June 9, 1987, at 4,425 (urging coverage).

[29] Lumbermen's Mut. Casualty Ins. Co. v. Randle, 370 F.2d 68, 72 (5th Cir. 1966).

[30] Griffin v. Maryland Casualty Co., 213 Miss. 624, 632, 57 So. 2d 486, 489 (1952); *see also* Monarch Ins. Co. v. Cook, 336 So. 2d 738, 741 (Miss. 1976) (quoting *Griffin*); Great Am. Ins. Co. v. Bass, 208 Miss. 436, 439, 44 So. 2d 532, 533 (1950) (construe policy in light of purpose and hazards).

> A contract of insurance should be given a fair and reasonable construction and, likewise, should be given a sensible construction, consonant with the apparent object and plain intention of the parties; a construction such as would be given the contract by an ordinary intelligent business man; and a practical and reasonable rather than a literal interpretation. The contract should not be given a strained, forced, unnatural, or unreasonable construction, or a construction which would extend or restrict the policy beyond what is fairly within its terms, or which would lead to an absurd conclusion, or render the policy nonsensical and ineffective.[31]

Although the above quotation was not made in a case involving a post-1966 "occurrence" policy, but in a case involving a pre-1966 "accident" policy, the same principles should apply.[32]

While there are no Mississippi cases on point, the foregoing Mississippi rules of insurance contract construction strongly suggest that a "fair and reasonable" construction of CGL policies is that they do cover environmental and pollution claims.

B. CGL Policies Cover Pollution Liability

It has been written that the standard form CGL policies, like those sold to thousands of policyholders in Mississippi, were "tailor-made" to cover most pollution problems.[33] As noted earlier, liability insurance is one of the most common forms of in-

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[31] Interstate Life & Accident Co. v. Waters, 213 Miss. 265, 272, 56 So. 2d 493, 495-96 (1952) (quoting 44 C.J.S. *Insurance* § 296, at 1163 (1938)). The court also wrote that where a policy could reasonably and sensibly be subjected to two interpretations, the interpretation most beneficial to the policyholder was to be chosen. *Id.* at 271, 56 So. 2d at 495; *see also* Locomotive Eng'rs Mut. Life & Accident Ins. Co. v. Meeks, 157 Miss. 97, 108, 127 So. 699, 703 (1930) (construe policy, like any other contract, in light of purposes and objectives of both parties).

[32] Wendorff, 1965 A.B.A. SEC. INS. NEGL. & COMPENSATION L. REP. 250, 252. The terms, "occurrence" and "accident" originate in the wording of the standard form CGL policies. *Id.* From 1940 to 1966, the language of the CGL policies obliged the insurance company "to pay all sums . . . for damages . . . caused by *accident*." *Id.* (emphasis added). The CGL policies were revised in 1966; the wording was changed from "caused by accident" to "caused by an occurrence." *Id.*

[33] Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237, 1251 (1986). This article was written patently in favor of insurance companies and against coverage, but the author does concede that pre-1970 CGL polices were "tailor-made" to cover most pollution events. *Id.*

surance and is issued in standardized forms prepared by industry-wide insurance organizations.[34] The insurance industry released a standard form CGL policy in 1940-41 and revised the form in 1943, 1947, 1955, 1966, and 1973.[35] When the standard form CGL policy was modernized in the 1960's, the insurance industry marketed the new policy (1966 CGL policy) as a broadening of coverage because, among other things, it covered liability for damages because of pollution, including liability for damages because of gradual pollution. Most of the cases involving the pre-1966 standard form CGL insurance policy have held that the policyholder was covered for liability resulting from pollution.[36]

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[34] Wendorff, *supra* note 32, at 251.

To put the subsequent discussion of drafting history documents in context, the following background is provided. In the early 1960's, the American insurance industry established a task force to draft what eventually became the 1966 standard form insurance policies. In 1960, two insurance industry organizations, the Mutual Insurance Rating Bureau (MIRB), representing mutual companies, and the National Bureau of Casualty Underwriters (NBCU), representing stock companies, established several committees that were engaged directly in the revision process. For a brief discussion of the drafting history of the standard form CGL policies, see American Home Prods. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1500-01 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984). MIRB and NBCU merged in 1971, forming the Insurance Service Office (ISO). NBCU and MIRB each maintained a separate Rating Committee and jointly maintained committees known as the Joint Scope of Coverage Subcommittee (JSCS), the Joint Forms Committee (JFC), and the Joint Drafting Committee (JDC). Mr. Wendorff was a member of the Joint Forms Committee (JFC) that drafted the CGL policy form.

Because of the common origin of these standardized policies, an issue of intent can be considered in light of industry-wide intent. Travelers Reply Memorandum in Support of Coordination, in Opposition to GAF's Motion for Separated Hearing and Exhibits in Support Thereof at 7-8, Armstrong Cork Co. v. Aetna Casualty & Sur. Co. (No. C 315367), as part of *In Re* Asbestos Ins. Coverage Cases, Proceeding No. 1072 (Cal. Sup. Ct., L.A. Cty. 1987).

[35] *General Liability Insurance—1973 Revisions*, Defense Research Inst. 3 (1974) [hereinafter DRI]. In 1985, the Insurance Service Office (ISO) rewrote the liability policy and named it the Commerical Liability Policy. A discussion of the new Commercial Liability Policy is beyond the scope of this paper.

[36] *See, e.g.*, Beryllium Corp. v. American Mut. Liab. Ins. Co., 223 F.2d 71, 73-76 (3d Cir. 1955) (finding coverage); Anchor Casualty Co. v. McCaleb, 178 F.2d 322, 324-25 (5th Cir. 1949) (same); Aetna Casualty & Sur. Co. v. Martin Bros. Container & Timber Prods. Corp., 256 F. Supp. 145, 148-50 (D. Or. 1966) (same); Moffat v. Metropolitan Casualty Ins. Co., 238 F. Supp. 165, 176 (M.D. Pa. 1964) (same); City of Myrtle Point v. Pacific Indem. Co., 233 F. Supp. 193, 199 (D. Or. 1963) (same); Employers Ins. Co. v. Rives, 264 Ala. 310, 87 So. 2d 653, 655-58 (1955) (same), *cert. denied*, 264 Ala. 696, 87 So. 2d 658

An examination of the historical development of the 1966 standard form CGL policy establishes that the insurance industry intended the CGL policy to cover environmental damage claims. For example, one high ranking insurance industry executive, in an address at an industry conference, noted that under the then-new 1966 CGL policy, "a manufacturers' basic premises operations coverage is liberalized most substantially."[37] In discussing coverage for environmental claims relating to on-site waste disposal areas, the executive recognized the difficulties associated with these claims: first, the property damage typically occurred gradually; second, policyholders were reticent to admit that their waste disposal site was the source of the problem and they were therefore unlikely or unable to take early remedial measures; and third, the costs of remediation, once the source was identified, could force the policyholder out of business.[38] In a paper that touted the then-new CGL insurance policy, the same executive noted some of the environmental damage claims that would be covered under the new policy as a result of gradual pollution from a policyholder's waste disposal activities: the contamination of streams, of water supplies, of the atmosphere,

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(1956); Moore v. Fidelity & Casualty Co. of New York, 140 Cal. App. 2d Supp. 967, 295 P.2d 154, 156-57 (1956) (same); Travelers Indem. Co. v. Humming Bird Coal Co., 371 S.W.2d 35, 38 (Ky. 1963) (same); White v. Smith, 440 S.W.2d 497, 507-12 (Mo. Ct. App. 1969) (same); City of Kimball v. St. Paul Fire & Marine Ins. Co., 190 Neb. 152, 206 N.W.2d 632, 638 (1973) (same); Cosmopolitan Mut. Ins. Co. v. Packer's Supermarket, Inc., 72 Misc. 2d 980, 340 N.Y.S.2d 461, 462-66 (1972) (same); Lancaster Area Refuse Auth. v. Transamerica Ins. Co., 437 Pa. 493, 263 A.2d 368, 369 (1970) (same); Taylor v. Imperial Casualty & Sur. Co., 82 S.D. 298, 144 N.W.2d 856, 859 (1966) (same); Massachusetts Bonding & Ins. Co. v. Orkin Exterminating Co., 416 S.W.2d 396, 399-402 (Tex. 1967) (same). *But see* Leggett v. Home Indem. Co., 461 F.2d 257, 260 (10th Cir. 1972) (denying coverage); American Casualty Co. v. Minn. Farm Bureau Serv. Co., 270 F.2d 686, 692 (8th Cir. 1959) (same); Farmers Elevator Mut. Ins. Co. v. Burch, 38 Ill. App. 2d 249, 187 N.E.2d 12, 14 (1962) (same); United States Fidelity & Guar. Co. v. Briscoe, 205 Okla. 618, 239 P.2d 754, 756-58 (1951) (same); Town of Tieton v. General Ins. Co. of N. Am., 61 Wash. 2d 716, 380 P.2d 127, 130-32 (1963) (same); Clark v. London & Lancashire Indem. Co. of Am., 21 Wis. 2d 268, 124 N.W.2d 29, 37 (1963) (same).

[37] G. Bean, Assistant Secretary, Liberty Mutual Insurance Company, New Comprehensive General and Automobile Program: The Effect on Manufacturing Risks 6 (Nov. 15-16, 1965), *quoted in* Pendygraft, Plews, Clark & Wright, *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, 21 IND. L. REV. 117, 141 (1988).

[38] *Id.*

or of vegetation as a result "of smoke, fumes, air or stream pollution."[39] A second high-ranking insurance industry executive in a presentation before another insurance industry group made similar observations, suggesting that, where a chemical manufacturing plant emitted noxious fumes, the 1966 CGL policy would provide coverage for the resulting property damage.[40] A third insurance industry gathering yielded the same general interpretation of the 1966 CGL policy, the speaker at the meeting stating that, "it is no longer necessary that the incident causing injury or damage be sudden in character . . . . Slow ingestion of foreign matter, inhalation of noxious fumes or the discharge of corrosive material into the atmosphere or water courses are examples of exposure type situations."[41] The consistent and uncontradicted positions of these and other insurance industry executives[42] strongly suggest that there is little doubt that damages because of bodily injury or property damage from gradual pollution were intended to be covered by the 1966 CGL policy.[43]

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[39] G. Bean, Summary of Broadened Coverage Under New CGL Policies with Necessary Limitation to Make This Broadening Possible (1966), *quoted in* Sayler & Zolensky, *supra* note 28, at 4,431-32.

[40] Address by L. Baldwin, American Society of Insurance Management 6 (Oct. 20, 1965), *quoted in* Anderson & Luppi, *supra* note 28, at 68.

[41] Address by H. Mildrum, Implications of Coverage for Gradual Injury or Damage 2-3 (Nov. 11, 1965), *quoted in* Sayler & Zolensky, *supra* note 28, at 4,431-32.

[42] Obrist, *New Comprehensive General Liability Insurance Policy—A Coverage Analysis* 6 (Nov. 1966) *reprinted in* DRI, *supra* note 35, at 28-39; Elliot, *The New Comprehensive General Liability Policy quoted in* Sayler & Zolensky, *supra* note 28, at 4,431.

[43] Reichenberger, *The General Liability Insurance Policies—Analysis of 1973 Revisions, reprinted in* DRI, *supra* note 35, at 7-15, 27-29, 31-36. Examples of the language changes made between the 1966 and 1973 CGL policies are as follows. In the 1966 CGL policy, "bodily injury" was defined as "bodily injury, sickness or disease sustained by any person," *Id.* at 7, while in the 1973 CGL policy, bodily injury was defined as "bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom," *id.* at 8.

In the 1966 CGL policy, "damages" was defined as "damages for death and for care and loss of services resulting from bodily injury and damages for loss of use of property resulting from property damage," *id.* at 8, while in the 1973 CGL policy no definition was given, *id.*

In the 1966 CGL policy, "occurrence" was defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured," *id.*, while in the 1973 CGL policy, "occurrence" was defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property

As discussed above, the 1966 standard form CGL policy, a form in use in Mississippi up until 1985, was issued with the anticipation that it would provide coverage for property damage resulting from environmental pollution, and premiums were collected with that belief. Several courts have followed the lead of insurance industry spokespersons and have found coverage for pollution liability under the 1966 CGL policy.[44]

C. Pollution Exclusion

Since, as noted above, the CGL policy was "tailor-made" to cover most pollution losses, an important issue is the effect of the subsequent pollution exclusion modification upon the scope of coverage.[45] The insurance industry added the exclusion as a mandatory endorsement in 1970 with the assertion that it was a "mere clarification" of existing coverage, and until recently the industry contended that the exclusion did not alter the scope of coverage.[46]

The pollution exclusion provides that the insurance coverage does not apply to:

> [B]odily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste

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damage neither expected nor intended from the standpoint of the insured," *id.* at 9.

In the 1966 CGL policy "property damage" was defined as "injury to or destruction of tangible property." *Id.* at 8. In the 1973 CGL policy "property damage" was defined as:

> (1) [P]hysical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

Id. at 10.

[44] *See* Steyer v. Westvaco Corp., 450 F. Supp. 384, 390 (D. Md. 1978) (damage by air pollution covered); Grand River Lime Co. v. Ohio Casualty Co., 32 Ohio App. 2d 178, 289 N.E.2d 360, 365-66 (1972) (accidental emission of industrial wastes held to be "occurrence"); Growers Refrigerating Co. v. American Motorists Ins. Co., 260 Ore. 207, 488 P.2d 1358, 1362 (1971) (accidental escape of ammonia covered). *Contra* Leggett v. Home Indem. Co., 461 F.2d 257, 260 (10th Cir. 1972) (escape of drycleaning fumes not covered).

[45] *See supra* notes 35-37 and accompanying text.

[46] Presentation by Houser & Gordon, The Pollution Exclusion—Is the 1966 Revision the Answer? E6 (May 15-17, 1985).

> materials or other irritants, contaminants or pollutions into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.[47]

A brief discussion of the genesis of the term "sudden and accidental" is essential to an understanding of the phrase. Although the insurance industry first used the phrase "sudden and accidental" in the pollution exclusion in 1970, that same phrase was used in boiler and machinery insurance policies for many years prior to 1970.[48] In boiler and machinery policies, the insurance industry defined the word "accident" to mean a "sudden and accidental breakdown" or a "sudden and accidental tearing."[49]

Prior to 1970, the industry had already litigated the meaning of "sudden and accidental" in boiler and machinery policies, and the phrase was uniformly interpreted by the courts to mean unexpected and unintended.[50] Clearly the insurance industry's

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[47] DRI, *supra* note 35, at 14.

By far the greatest number of potentially responsible parties (PRP's) are the policyholders who send waste to disposal facilities. They are jointly and severally liable under the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9674, *amended by* Superfund Amendments of Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (CERCLA), because they are generators. Whatever the pollution exclusion does, it should not deny coverage to such generators. While many insurance companies deny coverage to these "passive" polluters, in moments of candor these same insurance companies concede that the passive polluters are not the target of the exclusion. For example, in the "sudden and accidental" exception to the exclusion:

> The use of this term [the term "accidental"] plainly implies that activity undertaken *by the insured*, and over which the insured might be expected to have some control, is the focus of the exclusion, and that to come within the exception to the exclusion the "discharge" must not only be "sudden," but "accidental," or other than expected or intended.

Brief of Defendants, American Motorists Ins. Co. v. Aetna Casualty & Sur. Co. (Nos. C 87-02306 & 02311).

If the pollution exclusion can be read by a large number of "sophisticated" insurance company lawyers to eliminate coverage only for "activity undertaken *by the insured*," then passive polluters—generators—should be covered notwithstanding the pollution exclusion.

[48] Hoey, *The Meaning of "Accident" in Boiler and Machinery Insurance and New Developments in Underwriting*, 19 FORUM 467, 467 (1984).

[49] *Id.* at 467; S. HUEBNER, K. BLACK & R. CLINE, PROPERTY & LIABILITY INSURANCE 274 (1984).

[50] S. COZEN, INSURING REAL PROPERTY § 5.03(2)(b) (1989).

1970 intention regarding the meaning of the pollution exclusion must have been consistent with prior court interpretations of the phrase "sudden and accidental."

The phrase "sudden and accidental" has been discussed in leading treatises,[51] and one leading commentator on insurance law takes the position that the primary meaning ascribed to the term "sudden" should be "unexpected" rather than "instantaneous."[52]

The argument of the insurance industry that gradual pollution is not covered because it is not "sudden and accidental" does not withstand careful scrutiny. In a 1982 letter sent by Travelers Insurance Company to the State of New York Insurance Department, Travelers wrote:

> "Sudden and accidental" as a term standing by itself is capable of many interpretations . . . [T]here is nothing in the term "sudden and accidental" which requires the elimination of gradually occurring events from the collective . . . . There is nothing which prevents gradually occurring events from being considered to be "sudden and accidental" as long as there is no

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[51] *Id.*

> In order for the insured to recover under a boiler and machinery policy it must demonstrate that the occurrence was "sudden and accidental." Although the terms "sudden and accidental" seem to imply that an immediate or instantaneous event must occur, courts have construed these terms more broadly. Utilizing the "common meaning" doctrine, the courts have *uniformly* held that the dictionary definition of the terms as "*unforeseen, unexpected and unintentional*" is controlling.

Id. (emphasis added).

[52] *Id.*; G. COUCH, *supra* note 22, § 42:397, at 505 (1982). "When coverage is limited to a sudden 'breaking of machinery' the word 'sudden should be given its primary meaning as a happening without previous notice, or as something coming or occurring unexpectedly, as unforeseen or unprepared for.' That is, 'sudden' is not to be construed as synonymous with instantaneous." *Id.* (citations omitted).

Most recently, the Wisconsin Supreme Court held that the phrase "sudden and accidental" is ambiguous and therefore should be interpreted to mean "unexpected and unintended." *See* Just v. Land Reclamation Ltd., 456 N.W.2d 570, 579 (Wis. 1990). The decision drew extensively from the drafting history of the 1966 CGL policy, the insurance industry's submissions to state regulators, and contemporaneous discussions of the exclusion's clarifying nature. The opinion repudiated earlier Wisconsin cases on the pollution exclusion which had uniformly held that "sudden" had a temporal connotation. *Id. Contra* Hazen Paper Co. v. United States Fidelity & Guar. Co., No. Hd-5231 (Mass. June 14, 1990); Lumbermens Mutual Casualty Co. v. Belleville Indus., Inc., No. 8-5285 (Mass. June 14, 1990).

intent to cause injury or damages.[53]

The effect of the industry's assertion that the insertion of the pollution exclusion did not change the coverage of CGL policies is demonstrated by the *Wall Street Journal*'s interpretation of the announcement of the pollution exclusion by one major insurance company;[54] the paper concluded that the effect was that the company would no longer "exclude most pollution coverage from its general liability policies."[55]

The Insurance Commissioner of the State of West Virginia questioned the assertion that the pollution exclusion modification was of limited scope and ordered public hearings, during which the insurance companies gave written and oral representations to the Commissioner that the exclusions were "merely clarifications" of the provisions of extant CGL policies. As a result of these representations, the Commissioner approved the exclusions, but only "to the extent that said exclusions are mere clarifications of existing coverages."[56]

At the same time, the West Virginia Insurance Commissioner rejected another proposed pollution exclusion relating to oil and gas operations because he found that it did, in fact, reduce coverage.[57] Not all insurance regulators accepted the insurance industry's assertions, and therefore some states rejected the pollution exclusions.[58] Representations similar to those made to

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[53] Letter from Thomas A. Jackson, Secretary, Product Managements Div., The Travelers, to Mark Presser, Associate Insurance Examiner, Property and Casualty Ins. Bureau, State of New York Insurance Dept. (Jan. 13, 1982) (responding to objection to Travelers' Environmental Hazard Policy raised by Mark Presser in Dec. 11, 1981 letter).

[54] *Insuring Against Pollution*, Wall St. J. Apr. 14, 1970, at 22, col. 6.

[55] *Id.* Sixteen years after the fact an advocate for insurance companies took a contrary view. Note, *supra* note 33, at 1252 n.79.

[56] *In re*: Order of the Insurance Commissioner for the State of West Virginia, "Pollution and Contamination" Exclusion Findings, Administrative Hearing No. 70-4, at 3 (1970) [hereinafter Order]; *see also* Sayler & Zolensky, *supra* note 28, at 4,433-34 (quoting order and responses by involved insurance companies; both companies asserting that exclusion was meant to exclude only expected or intended damage).

[57] Order, *supra* note 56, at 5.

[58] Insurance Advisory Bulletin, North Carolina Insurance Department (Jan. 1, 1973).

"*ISO-G-521.* This endorsement deletes the contamination exclusion from the parts listed in the box at the top as respects policies issued in Maryland, New Hampshire, North Carolina and Vermont where the exclusion has not been approved." *Id.*

the West Virginia Commissioner were made to regulatory authorities in many states,[59] and these representations have been labelled "dishonest" by courts.[60]

If the insurance industry is held to its own words, even after the addition of the pollution exclusion to the standard form CGL policies—a "mere clarification"—the policies continued to be "tailor-made" to cover most pollution liability.[61]

In an agents' manual issued after the pollution exclusion modification, Travelers Insurance Company stated that, "[t]he use of 'sudden and accidental' language would not prevent [coverage of] gradually occurring events."[62]

An attorney for Aetna, in an article discussing the insurance industry's position, conceded that the insurance industry had a significant and traditional role to play in liability for pollution damage.[63] The attorney discussed the substantial historical limi-

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[59] *See* Letter from Mutual Insurance Rating Bureau to Members and Subscribers (July 1, 1970) (acknowledging that pollution exclusion endorsement had been filed in 31 states, including Mississippi) (*appended* as Exhibit "D" to Affidavit of William Rice, Niagara County v. Utica Mut. Ins. Co., 80 A.D.2d 415, 439 N.Y.S.2d 538 (App. Div. 1981)).

[60] Claussen v. Aetna Casualty & Sur. Co., 676 F. Supp. 1571, 1573 n.4 (S.D. Ga. 1987) (*Claussen I*). Despite the finding of dishonesty, the district court denied insurance coverage to the policyholder. *Id.* The appeal was eventually decided in favor of the policyholder. *See supra* note 21. In FMC Corp. v. Liberty Mut. Ins. Co., No. 643058 (Cal. Super. Dec. 9, 1988), the court denied the policyholder's motion for partial summary judgment, stating that the insurance companies had "understated" their position on the pollution exclusion to the West Virginia Commissioner; the court also observed that their acts could not be characterized as the sort of dishonesty that would give rise to a judicial estoppel. *Id.* at 11.

[61] The insurance industry now contends that the pollution exclusion "effected a very dramatic change in coverage." Transcript of Argument of Counsel for Atlantic Mutual Insurance Co. before the New York Court of Appeals at 26, Technicon Elec. Corp. v. American Home Ins. Co., No. 155 (N.Y. June 30, 1989). If so, a premium reduction would have been required at that time by state insurance regulators, and in some states insurance companies would have had to have notified policyholders upon renewal of any reduction in coverage. *See* Allstate Ins. Co. v. Fibus, 855 F.2d 660, 663 (9th Cir. 1988) ("[A]n insurance company is bound by a greater coverage in an earlier policy when a renewal policy is issued but the insured is not notified of the specific reduction in coverage"); Fields v. Blue Shield, 163 Cal. App. 3d 570, 209 Cal. Rptr. 781, 785-86 (1985) ("To be adequate, notice must be conspicuous, plain, and clear").

[62] *See* Memorandum of Allied-Signal, Inc. & UOP Inc. in Opposition to Defendants' Motion to Compel Discovery at 12, Allied-Signal, Inc. v. Abeille-Paix Reassurances, No. MRS-L-226-88 (N.J. Super. Ct. Law Div. Aug. 22, 1989) (No. MRS-L-226-88).

[63] Bruton, *Historical Liability and Insurance Aspects of Pollution Claims*, 1971

tations on the industry's liability.[64] First, coverage exclusions for oil and gas operations were a long-standing tradition within the industry.[65] A second limitation dealt with exclusions for damage resulting from "the discharge, release, or escape of pollutants, *unless* . . . the discharge . . . release or escape is "sudden and accidental."[66] The second limitation, the attorney wrote, was necessary to protect the industry from claims arising out of the intentional or knowing acts of policyholders while allowing "them [the insurance companies] to perform their traditional function as insurers of the unexpected event or happening."[67] He concluded that these limitations were necessary because if these potential types of risk were not excluded, the risks would be unmanageable.[68]

After enactment of CERCLA,[69] Aetna shifted its position somewhat and expressly acknowledged that its policy provided coverage in circumstances where the pollution was caused by a sudden occurrence or where cleanup activity would be required away from the policyholder's premises.[70]

At least two courts have recently relied upon these assertions by the insurance industry in refusing to apply the pollution exclusion.[71] One of the courts, the Supreme Court of Georgia, with this drafting and regulatory history before it, held that a policyholder was covered for its legal liability for damages because of pollution.[72] Not all courts have reached the same result;

A.B.A. Sec. Ins. Negl. & Compensation L. 303, 310-11.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9674, *amended by* Superfund Amendments & Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

[70] Interoffice communication from R.L. Stenlake, Director of Underwriting, Aetna, to C.N. Green, Assistant Vice President of Underwriting 3 (Apr. 27, 1982).

[71] Claussen v. Aetna Casualty & Sur. Co., 259 Ga. 333, 380 S.E.2d 686, 688-89 (*Claussen IV*) (exclusion clause did not exclude coverage liability for environmental contamination caused by extended, gradual discharge); United States Fidelity & Guar. Co. v. Specialty Coatings Co., 180 Ill. App. 3d 378, 535 N.E.2d 1071, 1078 (1989) (pollution exclusion did not bar coverage), *rev. denied*, 136 Ill.2d 609, 545 N.E.2d 133 (1989).

[72] *Claussen IV*, 380 S.E.2d at 687.

the Supreme Court of Alabama, without having the benefit of the drafting history and regulatory background, held that the pollution exclusion barred coverage.[73]

The Mississippi Insurance Department cannot produce copies of the filings relating to the pollution exclusion modification.[74] The copies maintained by the Insurance Services Office, Inc.,[75] in New York are not publicly available because the insurance industry maintains that they are confidential trade documents.[76]

Since policyholders in other states have been successful in using these filings to secure coverage for damages stemming from pollution claims, it would seem clear that if and when Mississippi policyholders obtain access to these filings, that they too should enjoy success through the use of these filings.[77] Certainly

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[73] Hicks v. American Resources Ins. Co., 544 So. 2d 952, 954 (Ala. 1989) (insurance company not required to indemnify because policy contained exclusion for damages caused by pollution).

[74] Telephone interview with Robert G. Gibson, Rating Director of the Mississippi Insurance Department (Jan. 16, 1990). Mr. Gibson stated that the department only has filings dating back to 1980 and that they are therefore unable to provide copies of the 1970 filings. *Id.*

[75] Insurance Services Office, Inc. (ISO) is a national, non-profit corporation that gathers, stores and disseminates aggregate statistical information to insurance regulators—as required by law—and to insurance companies for their use. In addition, ISO develops and assists in implementing insurance policy coverage programs and distributes industry-wide advisory insurance rate information, and where appropriate, files that information with state insurance regulators. ISO, Inc., Insurance Services Office In a Competitive Marketplace: ISO's Role within the Property/Casualty Insurance Industry 4 (June 1987) (company report).

[76] Two courts have ruled that the drafting history documents are protected. Morton Thiokol, Inc. v. General Accident Ins. Co., No. C-3956-85 (N.J. Super. Ct. Ch. Div. Dec. 12, 1988); New Castle County v. Hartford Accident & Indem. Co., 8 Fed. R. Serv. 3d (Callaghan) 506, 509 (S.D.N.Y. 1987). Both rulings are discussed in MEALEY'S LIT. REP.—INSURANCE, at 9 (Mar. 25, 1988). However, the "secret" documents have been used by the insurance industry when such use suits its purposes. *See* Brief of Plaintiffs-Appellees on Appeal at app., Upjohn Co. v. New Hampshire Ins. Co., 178 Mich. App. 706, 444 N.W.2d 813, 818, *petition for review pending*, Nos. 86909-11 (Mich. 1989) (using ISO documents).

[77] *See Claussen III*, 380 S.E.2d at 689; Kipin Indus., Inc. v. American Universal Ins. Co., 41 Ohio App. 3d 228, 535 N.E.2d 334, 338 (1987) (documents used and coverage found), *rev. denied*, No. 87-1720 (Ohio 1988); Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co., 218 N.J. Super. 516, 528 A.2d 76, 84-85 (1987) (same); *cf.* Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co., 17 Ohio App. 3d 127, 132-134, 477 N.E.2d 1227 *passim* (1984) (1970) (circular was in record, but not referred to in decision).

this should be the result, since, by characterizing the 1970 pollution exclusion as a "mere clarification" rather than a "very dramatic change in coverage," the insurance industry was able to avoid reducing premium rates and, in some states, avoid notifying policyholders that coverage upon renewal was reduced.[78]

A consideration of the position taken by two insurance companies in a recent case would also be helpful at this point. In *Upjohn Co. v. New Hampshire Insurance Co.*,[79] First State Insurance Company and a Lloyds of London syndicate represented to the court that the pollution exclusion was of very limited scope, imposing no additional hurdle for policyholders.[80] The court accepted this characterization, holding "that even a continuous discharge of chemicals may be both accidental (i.e., unintended) and sudden (i.e., unexpected) and, therefore, outside the pollution exclusion."[81] It should also be noted that the brief filed by these two insurance companies included the "secret" 1970 filings, supporting the authors' contention that the insurance industry will freely reveal these documents when to do so would benefit an insurance company.[82] Such a revelation was in the best interest of the two companies at the time, because they were aligned against other insurance companies.[83]

A second case involving insurance company against insurance company produced yet another characterization of the pollution exclusion as being only of limited scope. In *Allstate Insurance Co. v. Quinn Construction Co.*,[84] Allstate argued for coverage by another company's CGL policy, stating that:

> The purpose of the exclusion is limited; it is intended solely to deter intentional and willful pollution of the environment. As is evidenced by the exception to the exclusion for "sudden and

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[78] *See* Allstate Ins. Co. v. Fibus, 855 F.2d 660, 663 (9th Cir. 1988) ("[A]n insurance company is bound by a greater coverage in an earlier policy when a renewal policy is issued but the insured is not notified of the specific reduction in coverage.").

[79] 178 Mich. App. 706, 444 N.W.2d 813, *petition for review pending*, No. 86909-11 (Mich. 1989).

[80] Brief of Plaintiffs-Appellees on Appeal at 24-25, *Upjohn* (No. 98-969).

[81] *Upjohn*, 178 Mich. App. at 710, 444 N.W.2d at 817.

[82] Brief of Plaintiffs-Appellees on Appeal at app., *Upjohn* (No. 98-969); *see supra* note 76.

[83] Brief of Plaintiffs-Appellees on Appeal at 1, *Upjohn* (No. 98-969).

[84] 713 F. Supp. 35 (D. Mass. 1989).

> accidental" releases, the exclusion was *not* meant to penalize companies for unintended and unexpected discharges of hazardous substances.[85]

The court agreed.[86]

As *Upjohn* and *Allstate* show, many cases involve insurance company against insurance company, and when put in the posture of policyholders, the insurance companies of course take a pro-coverage position. Insurance companies should be estopped from taking positions in Mississippi courts that are contrary to the positions they have successfully argued in other cases. With respect to the inconsistent and contradictory positions taken by many insurance companies, one insurance industry trade publication recently averred that "[i]f the [drafting history] documents reveal that insurers actually intended the pollution exclusion clause to only clarify that intentional acts were barred from coverage, there is no way that insurers should be allowed to change their tune and now argue that the clause means something more."[87]

If the same rules apply to Mississippi policyholders, they should have no trouble obtaining the liability coverage they purchased because the pollution exclusion modification should be construed to be a mere clarification of the "neither expected nor intended" exclusion in the occurrence definition and not an additional hurdle for Mississippi policyholders.

D. Expected or Intended

Beginning in 1966, CGL policies provided coverage for damages resulting from an "occurrence." "Occurrence" was defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint

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[85] Brief in Support of Motion for Partial Summary Judgment at 12, Allstate Ins. Co. v. Quinn Constr. Co., 713 F. Supp. 35 (D. Mass. 1989) (No. 85-2220-WD). Allstate Insurance Company has since attempted to disavow the position taken in its brief. Affidavit of Linn S. Crim at 3, C.P.C. Int'l., Inc. v. Northbrook Excess & Surplus Ins. Co., No. 89-0211 L (D.R.I. Feb. 23, 1990).

[86] *Allstate*, 713 F. Supp. at 418.

[87] *Opinions: Revisionist History*, BUS. INS., Sept. 25, 1989, at 8.

of the insured."[88]

Then, in 1973, standard form CGL policies substituted the phrase "continuous or repeated" for the word "injurious" in this definition: "Occurrence means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."[89]

Clearly, the policies provide coverage for the damage resulting from unintentional acts and for the unexpected results of intentional acts. As one commentator stated:

> Two factors must be considered in connection with this definition of "occurrence"; one involves intent and the other foreseeability. . . . [I]nstances arise when the injury is an unintended result of an intentional act. *The two situations, an absence of intent or an unexpected result, would be covered under either the "accident" or "occurrence" definition.*[90]

In 1966, in a letter to a leading insurance brokerage firm, an insurance executive wrote that "[e]xpected means 'expected for a certainty.' "[91] Currently, however, insurance companies are contending that "expected or intended" is the equivalent of the negligence concept of foreseeability.[92]

The courts offered guidance on the matter in *Shell Oil Co. v. Accident & Casualty Insurance Co.*[93] The judge held that the policyholder [Shell] had forfeited its coverage if it had "intentionally committed an act wherein it should have reasonably been known by Shell that there was a high degree of certainty

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[88] DRI, *supra* note 35, at 8.

[89] *Id.* at 9.

[90] Obrist, *supra* note 42, at 6.

[91] Letter from Harold Schaffner, Hartford Insurance Group, to Robert F. Bauer, Assistant Secretary, Johnson & Higgins 5 (Aug. 25, 1966).

[92] *See* City of Carter Lake v. Aetna Casualty & Sur. Co., 604 F.2d 1052, 1058 (8th Cir. 1979) (Aetna asserting reasonably foreseeable standard). *Contra* Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion for Partial Summary Judgment at 127, Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 507 F. Supp. 59, *aff'd*, 676 F.2d 56 (3d Cir. 1982) (No. 78-1151) (Liberty Mutual Insurance Co. argued that if drafters had intended to exclude foreseeable damage, they would have used that phrasing in definition of "occurrence").

[93] No. 278953, (Cal. Super. Ct. Oct. 6, 1988).

that damage to the property of another would result."[94]

The policy drafters were more realistic. One of the principal drafters of the 1966 CGL policy testified recently that insurance companies were primarily concerned with excluding from coverage "intentional results of intentional act[s], such as murder."[95] They were also concerned with the concept of the phrase "caused by accident" and whether it was "from the point of view of the insured."[96]

The drafters considered and rejected an approach which could have highlighted an exclusion for intentional injuries, thereby removing some ambiguity. The rejected proposal would have used an express, specific exclusion of intentional injuries rather than relying on limitations in the definition of "occurrence."[97]

Relying on the testimony of one of the drafters, and after reviewing drafting history documents, the judge in *In re Asbestos Insurance Coverage Cases*[98] held "that the 'neither expected nor intended' language in the definition of 'occurrence' excluded coverage only where the insured acted either willfully, intentionally or maliciously for the purpose of causing injury."[99] The court placed special emphasis on the phrase "from the viewpoint of the insured," which it found "clearly mandates that the Court focus its inquiry on the *insured's* actions and motivations rather than the *insurer's* knowledge and perspective."[100] Finally, the court found that its standard accorded with "the language's focus on the insured's *intention to cause the resultant damage*, rather than on its intention merely to commit the act which

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[94] *Id.*, slip op. at 48.

[95] Testimony of Mr. Herbert P. Schoen, a member of the Joint Drafting Committee, on March 4, 1986, Record at 15901-02, *In Re* Asbestos Ins. Coverage Cases, Judicial Council Coordination Proceeding No. 1072 (Cal. Super. Ct., May 29, 1986) (testimony during deliberation of Phase III Issues).

[96] *Id.*

[97] Schmalz, Taking the Suddenness Out of Accident—Some Drafting Problems and Possible Solutions 14, undated note attached to Letter from Edward F. Earle to Stock Members of Joint Forms Committee (April 21, 1961).

[98] Judicial Council Coordination Proceeding No. 1072, (Cal. Super. Ct., May 29, 1986).

[99] *Id.*, slip op. at 74.

[100] *Id.*, slip op. at 75; *see also* Allstate Ins. Co. v. Freeman, 432 Mich. 656, 676-82, 443 N.W.2d 734, 744-46 (1989) (coverage considered from viewpoint of policyholder).

causes the damage."[101]

Moreover, without underplaying the importance of the above decision, the ruling by another California court, as shown in pertinent part below, should be of vital interest to Mississippi policyholders:

> [T]he Court finds the phrase "expected or intended" ambiguous in terms of its operation and effect in the policies. Under the California law, "any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer and . . . if semantically permissible, the contract will be given such construction as will . . . provid[e] indemnity for the loss to which the insurance relates." Furthermore, "[w]hereas coverage clauses are interpreted broadly so as to afford the greatest possible protection to the insured . . . exclusionary clauses are interpreted narrowly against the insurer." Therefore, the coverage grant in the policies issued . . . must be interpreted broadly and so as to provide indemnity, compelling the conclusion that the limiting phrase of "expected or intended" is in fact an exclusion designed to deny coverage in certain narrow instances.[102]

On the basis of their strikingly similar analysis of other types of insurance policies, Mississippi courts should hold that coverage is provided for damages relating to environmental claims arising from conditions which were not intended to cause

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[101] *In Re Asbestos Ins. Coverage Cases*, Judicial Council Coordination Proceeding No. 1072, slip op. at 75 (emphasis added).

[102] Clemco Indus. v. Commercial Union Ins. Co., 665 F. Supp. 816, 820-21 (N.D. Cal. 1987), *aff'd*, 848 F.2d 1242 (9th Cir. 1988). The court continued by writing that:

> [I]n order for Commercial to prove that Clemco 'expected or intended' the losses for which it seeks coverage, Commercial had to prove that Clemco engaged in some conscious, calculated, or deliberate act(s) that directly led to the losses that are now the subject of the disputed coverage. *Id.* at 821.

See also United States Fidelity & Guar. Co. v. Armstrong, 479 So. 2d 1165, 1167 (Ala. 1985):

> There is a presumption in tort law that a person intends the natural and probable consequences of his intentional acts. However, this presumption has no application in the interpretation of the terms used in the "neither expected nor intended from the standpoint of the insured" coverage clause and the policy term "expected or intended injury" cannot be equated with foreseeable injury.

Id.

the injury.[103]

The appropriate standard was used in a case discussed earlier in this article, *Aerial Agricultural Service of Montana, Inc. v. Till.*[104] In *Till* the terms "occurrence," "accident," and "accidentally" were interpreted to determine whether the policy covered liability for damages caused by the policyholder's negligent design of a machine for the distribution of rice seeds.[105] First, after determining that the policy language was ambiguous, the court stated the rule of construction "that language in insurance contracts is to be construed according to its usual and ordinary meaning so that a person of ordinary intelligence can understand 'that a particular hazard is not covered.' "[106] Then, applying that rule to the particular language and facts in dispute, the court concluded that the damage from the design failure was covered: "Aerial intentionally created the condition which gave rise to the poor, uneven distribution of the rice seed, but the poor, uneven distribution of the seed was unintended. Such distribution was 'accidentally caused' within the meaning of the policy."[107]

In finding coverage, the court in *Till* properly focused on the unintended consequences of the act rather than on the causative act itself.[108] Unfortunately, not all Mississippi cases have followed this analysis, some focusing more on the act than on the resulting damage.[109] These cases also seem to have adopted the inappropriate foreseeability test discussed earlier.[110]

An example of a Mississippi case that seemed to focus improperly on the causative act rather than the unintended nature of the damages and that seemed to adopt the inappropriate foreseeability test is *Allstate Insurance Co. v. Moulton.*[111] *Moulton* involved a coverage dispute over whether a comprehensive

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[103] *See supra* notes 7-11, 20-32.

[104] 207 F. Supp. 50 (N.D. Miss. 1962).

[105] *Till*, 207 F. Supp. at 58.

[106] *Id.* at 57.

[107] *Id.* at 59.

[108] *See supra* notes 90-101 and accompanying text.

[109] *See infra* notes 111-16 and accompanying text.

[110] *See supra* notes 91-96 and accompanying text.

[111] 464 So. 2d 507 (Miss. 1985).

dwelling policy, with the same basic language as in the 1970 CGL policy, obligated the insurance company to provide a defense for the policyholder against a malicious prosecution action.[112] In its holding interpreting the terms "accident" and "occurrence," the court concluded "that the term accident refers to Mrs. Moulton's [the policyholder's] actions and not whatever unintended damages flowed from that act."[113] Of course, once the court focused on Moulton's actions and not the resulting damages, it had to hold that there was no obligation to defend and indemnify, since the intentional causative acts involved in a malicious prosecution claim could not be considered "accidental" within the court's definition.[114]

Moulton involved the intentional tort of malicious prosecution. However, even the definition of an intentional tort contemplates an analysis of whether the actor expected or intended the result. The Mississippi Supreme Court, in a case involving workers' compensation issues, stated, "An intentional tort is an act of intentional behavior *designed to bring about* the injury."[115] The court did not say that it is an act of intentional behavior that foreseeably might bring about the injury.

Several Mississippi cases have cited *Allstate Insurance Co. v. Moulton*. Two of the cases involved intentional shootings by the policyholder, and the courts held that there was no coverage for these intentional torts, focusing on the acts themselves and the "foreseeability" of the resulting injuries or damages.[116] In contrast, in an Alabama sexual abuse case, the court held that the psychological damage sustained by a child as a result of sexual abuse by her grandfather was neither expected nor intended by him and that there was therefore coverage under the homeowner's policy for the minor's bodily injury claim against her

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[112] *Moulton*, 464 So. 2d at 508.

[113] *Id.* at 510.

[114] *Id.*

[115] Stevens v. FMC Corp., 515 So. 2d 928, 931 (Miss. 1987) (emphasis added).

[116] Berry v. McLemore, 795 F.2d 452, 458 (5th Cir. 1986) (no coverage under town's liability policy for intentional shooting by police officer); Gulf Ins. Co. v. Lloyd, 651 F. Supp. 518, 518-20 (S.D. Miss. 1986) (no coverage under homeowner policy for wrongful death action where defendant clearly intended to draw gun, although he may not have intended to kill deceased).

grandfather, the court concluding "that an 'expected injury,' as that term is used in an insurance exclusionary clause, cannot be equated with foreseeable injury."[117]

Intentional tort cases, particularly the shooting cases and the sexual abuse case, are on the cutting edge of the cases litigating the "neither expected nor intended" exclusion in the occurrence definition. They are a far cry from environmental insurance coverage cases.

Foreseeability should not be the test, because, as was noted earlier in this article, that was not the drafters' intent.[118] Furthermore, as a matter of logic, foreseeability cannot be the test: if there were no coverage for the foreseeable damage of the tortious conduct, there would be virtually no insurance coverage.[119] As Judge (later Justice) Cardozo held long ago, "[t]o restrict insurance to cases where liability is incurred without fault of the insured would reduce indemnity to a shadow."[120]

The problem with using foreseeability as the test was raised by the Kentucky Natural Resources and Environmental Protection Cabinet in an amicus brief it filed in a recent case interpreting the term "occurrence" in the context of coverage for environmental damage under a CGL policy.[121] The brief stated that the foreseeability test should not be used, because, as the brief noted:

> Taking the [insurance companies'] argument to its logical conclusion, if property damage is "reasonably foreseeable" from the insured's conduct, the insured will be negligent but there

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[117] State Auto Mut. Ins. Co. v. McIntyre, 652 F. Supp. 1177, 1197 (N.D. Ala. 1987).

[118] *See supra* notes 95-96 and accompanying text.

[119] *See* Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion for Partial Summary Judgment at 127-A, Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 507 F. Supp. 59, *aff'd*, 676 F.2d 56 (3d Cir. 1982) (No. 78-1151). (Liberty Mutual argued that " 'foreseeability' . . . is not a test for intent. The . . . policy does not mention 'foreseeable,' 'foresee,' or 'foreseeability' in its definition of 'occurrence.' 'Foreseeability' is a tort concept which enters into analysis of 'intentional' actions/results in problems of causation. It is not a necessary concept in analysis of 'occurrence' as used in insurance policies.").

[120] Messersmith v. American Fidelity Co., 232 N.Y. 161, 163, 133 N.E. 432, 432 (1921).

[121] Appeals Brief and Appendix for Kentucky Natural Resources and Environmental Protection Cabinet, Amicus Curiae at 5, 7-8, James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co., No. 85-CA-2405-MR (Ky. Ct. App., March 9, 1989).

> will be no insurance coverage. If damage is not "reasonably foreseeable," there would be insurance coverage available but there would be no need of it, since without the reasonable foreseeability of damage, there is no negligence and no obligation to pay damages.[122]

The Kentucky Court of Appeals rejected that argument, applying tort concepts associated with the terms "occurrence" and "accident."[123] This result is inconsistent with the plain language of an earlier Kentucky Supreme Court decision that the intermediate court of appeals purported to distinguish.[124] In that earlier decision, which involved interpretation of the term "accidental" in an insurance policy, the supreme court had written that contract language should not be interpreted with reliance upon concepts from non-contract branches of the law: "The fundamental flaw with such a rule is that it subjects contract terms to analysis under tort principles such as fault and foreseeability . . . . Principles of tort law and criminal law have no application to the [insurance] contract issue in question."[125]

However, even if foreseeability were the proper test, the insurance companies admit that when many of the acts that eventually lead to liability were committed, it was wholly unforeseen that causes of action for environmental damage would arise.[126] That is, when the hazardous waste, for example, was disposed of, environmental regulations that are currently imposing liability for that disposal did not exist; therefore, "these companies were not acting in a deliberate or irresponsible way. At the time, they were not aware of the future consequences of their waste dispo-

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[122] *Id.*

[123] James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co., No. 88-CA-2405-MR, slip op. at 6-7.

[124] Fryman v. Pilot Life Ins. Co., 704 S.W.2d 205, 206 (Ky. 1986).

[125] *Id.*

[126] American International Group, Financing the Cleanup of Hazardous Waste: The National Environmental Trust Fund, Press Release 2 (March 2, 1989) [hereinafter *Financing*]. An executive of a leading insurance company has recently stated in a television interview that, "overwhelmingly, the companies that are being asked to clean up the environment, their pollution sites, were doing so at the time in accordance with law and regulation, they were disposing of waste not illegally at the time, but legally." Interview with Maurice Greenberg, American International Group, on *Inside Business*, (Cable News Network Nov. 18, 1989).

sal practices, and business was not alone in this ignorance."[127] Moreover, insurance companies have admitted that their policies may cover illegal acts.[128]

Even though there are some troubling decisions by the federal courts in Mississippi,[129] a recent decision by the Mississippi Supreme Court, *Coleman v. Sandford*,[130] appears to be headed in the right direction by shifting the emphasis away from the causative act and the foreseeability of the results and moving instead toward an analysis that considers the injuries from the perspective of the insured.[131] In *Coleman*, the court stated that "[a]n act is intentional if the actor desires to cause the consequences of his act, or believes that the consequences are substantially certain to result from it."[132]

As mentioned earlier in this article, the insurance policies sold to Mississippi policyholders were designed to cover even more claims than are suggested by *Coleman*; that is, the policies were drafted to eliminate coverage only for those consequences that were "certain," but not for those consequences that were merely "substantially certain."[133]

While a "substantially certain" test gives Mississippi policyholders less insurance coverage than they purchased, it is better than a foreseeability test that would yield no coverage at all. The policies sold to Mississippi policyholders were drafted to cover liability for property damage unless that property damage was expected to a certainty and unless the policyholder had a subjective intention to do the precise damage that resulted.[134] It will be a rare Mississippi policyholder that will be found to have

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[127] *Financing*, *supra* note 126, at 2.

[128] Trial Transcript at 94, (Feb. 17, 1984), American States Ins. Co. v. Maryland Casualty Co., 587 F. Supp. 1549 (E.D. Mich. 1984) (No. 82-70353) (insurance executive testifying that illegal acts often constitute premise for coverage); *see also* Brief and Argument of Defendant-Appellee International Insurance Company at 9, Mason v. Home Ins. Co., 177 Ill. App. 3d 454, 532 N.E.2d 526 (1988) (No. 3-88-0070) (coverage would exist for liability for preparation of food in violation of ordinances and statutes).

[129] *See supra* note 116 and accompanying text.

[130] 521 So. 2d 876 (Miss. 1988).

[131] *Coleman*, 521 So. 2d at 877-78.

[132] *Id.* at 878.

[133] *See supra* notes 95-97 and accompanying text.

[134] *Id.*

set out on a deliberate, conscious course designed to damage the state's environment.

E. Punitive Damages

In 1973, the insurance industry considered adding an exclusion for punitive damages to the standard form CGL policy, but the proposal was rejected because the "basis for assessing punitive damages . . . varies from state to state and many insurers expressed the view that [the] wording of the endorsement was not appropriate for all circumstances."[135] There is no express exclusion of punitive damages. Arguably, therefore, since it is the stated position of the insurance industry that "the policy will cover the insured's legal liability if no specific exclusion applies,"[136] there is coverage for punitive damages.[137]

In Mississippi, it is not against public policy for liability insurance to cover punitive damages.[138] This rule has two important ramifications for Mississippi policyholders. First, the rule means that there is liability insurance coverage for punitive damage judgments rendered against a policyholder unless the insurance policy specifically excludes such coverage.[139] Second, the

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[135] K. REDDEN, PUNITIVE DAMAGES 687-88 (1980).

[136] Obrist, *supra* note 42, at 7.

[137] *Id.*; *see also supra* note 12 (stating rule that insurance contract as contract of adhesion is to be construed most strongly in favor of policyholder). *Contra* K. REDDEN, *supra* note 135, at 687 ("In all probability, the rejection by the insurers resulted from their belief that punitive damages were already clearly beyond the policy coverage and a specific exclusion was thus unnecessary and undesirable"). Redden would not apply in Mississippi, where, as in most states, everything is included in coverage except that which is expressly excluded. *See supra* notes 23-25 and accompanying text.

[138] *See* Old Sec. Casualty Ins. Co. v. Clemmer, 455 So. 2d 781, 783 (Miss. 1984) (if punitive damages are to be excluded from coverage it must be by terms of policy; there is no public policy exclusion); Anthony v. Frith, 394 So. 2d 867, 868 (Miss. 1981) (pedestrian awarded punitive damages could recover those damages under the policyholder's automobile liability insurance policy and such recovery was not against public policy). These holdings of the Mississippi Supreme Court are in accord with the majority of the courts that have addressed the issue of whether insurance coverage of punitive damage awards violates public policy. *See* LeDoux v. Continental Ins. Co., Inc., 666 F. Supp. 178, 180 (D. Alaska 1987) (noting that majority rule did not exclude punitive damages).

[139] *See Starkville Mun. Separate School Dist. v. Continental Casualty Co.*, 772 F.2d 168, 170 (5th Cir. 1985) (under school district's insurance policy, there was no coverage for punitive damages because the policy specifically stated that it did not cover fines; court further stated that "[w]here an insurer wishes to exclude certain items from

rule indicates that policyholders may be covered even though their conduct may be found to have been quite reprehensible. In other words, there is even coverage for the policyholder's acts of malice or his acts of gross negligence or reckless disregard for the rights of others, since those are the standards in Mississippi for assessing punitive damages.[140] In light of the above, it can be argued that by selling liability insurance to policyholders in Mississippi, insurance companies have assumed coverage liability for the acts of policyholders that are more than merely negligent; the coverage liability may extend to situations where the acts invite moral condemnation.

III. Trigger of Coverage

Where environmental damage occurs over a number of policy years—as it usually does—multiple policies could apply. The best review of the cases and the answer to the trigger of coverage argument is set forth by First State Insurance Company and a Lloyds of London syndicate in their brief to the Michigan Court of Appeals in *Upjohn Co. v. New Hampshire Insurance Co.*[141] First State, which is part of the Hartford Insurance Group, and Lloyds argued for a "continuous injury" trigger and discussed the theories of trigger of coverage as follows:

> The issue of determining when property damage occurs in cases where the initial exposure to harmful conditions and discovery or injury can be separated by substantial periods of time is difficult to resolve. At least four different theories have been applied to determine when damage occurs in cases dealing with exposure to toxic substances: (1) Manifestion—damage occurs when injury or damage becomes apparent; (2) Initial exposure—damage occurs at the instant damage first begins; (3) Actual injury—damage occurs at the actual time of injury irrespective of when damage is discovered; (4) Multiple triggers or continuous injury — damage occurs continuously or at all points from exposure to manifestion . . . .

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the policy's coverage, it must do so explicitly"); *Clemmer*, 455 So. 2d at 783 (language of policy must specifically exclude punitive damages).

[140] *See* Whittington v. Whittington, 535 So. 2d 573, 583 (Miss. 1988) (noting standard for assessing punitive damages).

[141] 178 Mich. App. 706, 444 N.W.2d 813 (1989).

> Plaintiffs contend that the continuous or multiple trigger approach is the most appropriate theory to be applied in the present case.[142]

The appeals court in *Upjohn* held "that damage occurred with each spill within the policy period."[143]

Commentators suggest that the general thrust under each of the theories is to provide maximum coverage,[144] a policy goal consistent with the general rules of insurance law.[145] Multiple policies are applied under the continuous trigger principle, and it provides the maximum protection to the policyholder.[146] Continuous trigger appears to have been the approach contemplated by the drafters of the 1966 CGL.[147]

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[142] Brief of Plaintiffs-Appellee on Appeal at 46, *Upjohn*, 178 Mich. App. 706, 444 N.W.2d 813 (1989) (No. 98-969) (citations omitted). First State has now disavowed its position. *See* Appellant's Request for Judicial Notice at 2, 6-7, Intel Corp. v. Hartford Accident and Ind. Co., No. 89-15165 (9th Cir. Aug. 18, 1989). ("In its capacity as plaintiff and subrogee of Upjohn, First State has allowed its name to be attached to Upjohn's arguments, to which it does not subscribe, in both the Circuit Court and the Court of Appeals. First State now wishes to acknowledge its error, renounce certain positions taken in those briefs, and clarify before this Court its actual position on the pollution-related insurance coverage issues raised by this case.").

Although Insurance Co. of N. Am. v. Forty-Eight Insulations, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 455 U.S. 1099 (1982) is usually cited as supporting the "exposure theory," it may be a continuous trigger case. *See* Hancock Labs., Inc. v. Admiral Ins. Co., 777 F.2d 520, 525 n.10 (9th cir. 1985) (liability under multiple policies). Eagle-Picher Indus. v. Liberty Mut. Ins. Co., 682 F.2d 12 (1st Cir. 1982) (*Eagle-Picher I*) was based upon a special non-standard agreement between the policyholder and Liberty Mutual and was very substantially modified in Eagle Picher Indus. v. Liberty Mut. Ins. Co. (*Eagle-Picher II*), 829 F.2d 227 (1st Cir. 1987), where the court adopted a "reasonably capable" test for determining the date of diagnosability and put the burden of proof on the insurance company to demonstrate by clear and convincing evidence that no injury happened during its policy period. *Id.* at 250. The difference between the injury-in-fact trigger adopted in *American Home* and the continuous injury principle adopted in Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007, *reh'g denied*, 456 U.S. 951 (1982), is hard to distinguish. It would be strikingly anomalous if that very proof nullified the defendant's insurance. Logically, it cannot.

[143] *Upjohn*, 178 Mich. App. 706, 444 N.W.2d 813, 820 (1989).

[144] *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1578 (1986).

[145] *See supra* notes 4-12 and accompanying text.

[146] R. KEETON & A. WIDISS, INSURANCE LAW § 510, at 600 (1988).

[147] G. Bean, *supra* note 37, at 6:

> This brings into focus one important change in our policy—the fact that coverage no longer attaches when the accident occurs but rather when the injury or damage takes place. This means that the policy in force when a particular in-

Under the continuous trigger principle, when property damage or bodily injury is a continuing process spanning several policy periods and thereby involving multiple policies, there is insurance coverage under each policy; this principle was perhaps best stated by the Court of Appeals for the District of Columbia in *Keene Corp. v. Insurance Co. of North America.*[148] "We conclude that each insurer on the risk between the initial exposure and the manifestation of disease is liable . . . for indemnification and defense costs."[149]

It should be noted that the arguments of the insurance company in *Upjohn* were not an isolated occurrence. In numerous cases the insurance companies have argued that the continuous-trigger principle should be applied.[150] Many insurance companies have followed the continuous trigger in practice. For instance, *The Travelers' Liability Claims Manual* recognized that continuous damage triggers successive policies:

> Reviewing the occurrence definition, one can see it does several things. First of all, it is no longer necessary that the injury be sudden in character, and in fact many courts have already defined accident in almost the same way we defined occurrence. The injury must occur during the policy period because coverage is triggered by the injury, not the accident, but *the focus must always be on the injury. When the injury is gradual,*

> jury or damage takes place is the one which applies, regardless of when the causing accident took place. So if the injury or damage from waste disposal should continue after the waste disposal ceased, as it usually does, it could produce losses on each side of a renewal date, and in fact over a period of years, with a separate policy applying each year.

Id.

[148] 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007, *reh'g denied*, 456 U.S. 951 (1982).

[149] *Keene*, 667 F.2d at 1041.

[150] Brief on Behalf of Defendant North Star Reinsurance Corp. in Opposition to Defendant-Appellants' Motion for Leave To Appeal at 18-19, Solvents Recovery Serv. v. Midland Ins. Co., 218 N.J. Super. 49, 526 A.2d 1112 (1987) (No. A-2570-86T5); Brief of Appellee Travelers Indem. of Rhode Island at 30, Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980) (Nos. 78-1322-26), *modified*, 657 F.2d 814, *cert. denied*, 454 U.S. 1109 (1981); Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 6-7, Centennial Ins. Co. v. Lumbermens Mutual Casualty Co., 677 F. Supp. 342 (E.D. Pa. 1987) (No. 86-6064); Post-Argument Brief of Appellee Aetna Casualty & Surety Co. at 1, Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir.) (No. 78-1953), *cert. denied*, 454 U.S. 1109 (1981).

> *resulting from continuous or repeated exposures, and occurs over a period of time, coverage may be afforded under more than one policy—the policies in effect during the period of injury.*[151]

Furthermore, even scholars who normally take a stance favoring insurance companies have agreed that CGL policies contemplate application of the continuous trigger principle.[152] Thus, the drafting history, the case law and the arguments of many insurance companies support the adoption of a continuous trigger of coverage principle.

According to the insuring agreement of the standard form CGL policy, the insurance company agrees to indemnify the policyholder for "all sums which the insured . . . shall become legally obligated to pay as damages because of . . . bodily injury or . . . property damage . . . caused by an occurrence."[153] In relation to the acceptance of a "continuous trigger" concept or any other extended exposure definition of occurrence, the phrase "all sums" has an important bearing on the allocation of liability among various policies. Such questions arise as whether the policyholder must pay some portion of the liability itself if the policyholder was uninsured or underinsured in various years that have been triggered. According to one of the drafters of the CGL policy, "there is no pro-ration formula in the policy, as it seemed impossible to develope a formula which would handle every possible situation with complete equity."[154]

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[151] *Quoted from* Memorandum of Allied-Signal, Inc. In Support of Its Motion for Partial Summary Judgment and In Opposition to Travelers' Motion for Partial Summary Judgment at 209 (dated March 21, 1989), Travelers Indem. Co. v. Allied-Signal, Inc., 718 F. Supp. 1252 (D. Md. 1989) (No. JFM-88-890) (emphasis added).

[152] Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 964 (1988). ("Until recently, for example, the standard CGL always had been an occurrence policy—it provided coverage against liability arising out of activities occurring during the policy period, regardless of the time when a claim or suit alleging such liability was made").

Professor Abraham has recently reconsidered the position taken in his article when he testified before the Massachusetts Department of Public Utilities. Abraham, Testimony at Rulemaking Proceeding Regarding the Appropriate Regulatory Treatment of the Manufacturing Site Cleanup Costs, Commonwealth of Massachusetts Department of Public Utilities, D.P.U. No. 89-161, Vol. I., 190-192, 200 (Feb. 15-16, 1990).

[153] S. MILLER & P. LEFEBVRE, *supra* note 14, at 411.

[154] R. Schmalz, The New Comprehensive General Liability and Automobile Pro-

In the asbestos property damage context, several courts have concluded that under policies which provide for payment of "all sums," all of the insurance companies whose policies were triggered are jointly and severally liable to the policyholder for indemnity payments. As the court ruled in the California *Asbestos Insurance Coverage Cases*,[155] the insurance companies are not entitled to make a pro rata allocation to the policyholder or, until the policyholder has been paid, to any other triggered policies, because every triggered policy "has an independent obligation to respond in full to a claim."[156] In other words, "all sums means all sums."

Accordingly, where the policy requires the insurance company to pay "all sums," as in the standard form, the policyholder is entitled to coverage in full under each of the triggered policies at its option up to the limits of liability.[157]

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gram, Presentation at Mutual Insurance Technical Conference 6 (Nov. 15-18, 1965).

[155] Judicial Council Coordination Proceeding No. 1072, slip op. at 68, (Cal. Super. Ct. May 29, 1987) (Tentative Decision of Phase III Issues).

[156] *See* Lac D'Amiante Du Quebec, Ltée. v. American Home Assurance Co., 613 F. Supp. 1549, 1559-61 (D.N.J. 1985), *vacated on other grounds only as to one insolvent defendant*, 864 F.2d 1033 (3d Cir. 1988) (asbestos-related property liability for damage triggers coverage from installation through removal or abatement of asbestos-containing material); *see also* Gruol Constr. Co. v. Insurance Co. of N. Am., 11 Wash. App. 632, 524 P.2d 427, 431, (three successive insurance companies all held responsible for progressive and continuous damage caused by underground dry rot beginning several years before its discovery) *rev. den.*, 84 Wash. 2d 1014 (1974). In Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), the court held that the "all sums" language of the policy required a finding of joint and several liability under the rationale that the dominant purpose of the insurance coverage was to:

> [Relieve the policyholder] of the risk of liability for latent injury of which [it] could not be aware when it purchased insurance. [The policyholder] did not expect, nor should it have expected, that its security was undermined by the existence of prior periods in which it was uninsured, and in which no known or knowable injury occurred. If, however, an [insurance company] was obligated to pay only a *pro rata* share of [the policyholder's] liability . . . those reasonable expectations would be violated.

Id. at 1047-48.

[157] *See, e.g.*, Avondale Indus., Inc. v. Travelers Indem. Co., 697 F. Supp. 1314, 1323 (1988), *aff'd*, 887 F.2d 1200, 1208 (2d Cir. 1989) (policyholder had election of insurance companies to name as defendant), *reh'g denied*, 894 F.2d 498 (2d Cir. 1990); California Union Ins. Co. v. Landmark Ins. Co., 145 Cal. App. 3d 462, 470, 193 Cal. Rptr. 461, 465 (1983) (both underwriters jointly liable); General Constr. Co. v. Insurance Co. of N. Am., 11 Wash. App. 632, 524 P.2d 427, 431 (three successive insurers responsible for progressive and continuous damage), *rev. denied*, 84 Wash. 2d 1014 (1974).

IV. The Duty To Investigate and To Defend Administrative Actions

Policyholders involved in environmental actions brought by government agencies and private parties require defense, and as part of the defense, investigatory services are often needed. Insurance companies contend that environmental administrative actions are not "suits" as that word is used in the policy and that therefore there is no duty to defend.[158]

A. Duty To Investigate

Insurance companies have recognized that the investigation of claims is one of the services that they sell, and as such, this sale gives rise to a duty to defend.[159] The insurance companies have characterized this duty as a "fundamental part and parcel of [the insurance companies'] obligation."[160] Such a duty is consistent with public policy because, as suggested by insurance advertisements, these services are offered as part of the insurance companies' general skill in handling claims.[161]

While "[i]t is well settled that an insured is entitled to a reasonable investigation as part of its defense,"[162] the question of what is "reasonable" is far from settled, particularly in the case of pre-claim investigative expenses.[163] A leading treatise on

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[158] The standard form CGL policy wording is: "[T]he Company shall have *the right and duty to defend any suit* against the insured . . . ." S. Miller & P. Lefebvre, *supra* note 14 (emphasis added).

[159] Brief of Plaintiff-Appellee Liberty Mut. Ins. Co. at 10-11, Liberty Mut. Ins. Co. v. Continental Casualty Co., 771 F.2d 579, (1st Cir. 1985) (No. 84-1878).

[160] *Id.* at 11.

[161] *Id.* (citing 7C J. Appleman, *supra* note 1, § 4687). Appleman has been cited with approval by courts. *See* Continental Ins. Co. v. Bayless & Roberts, Inc., 608 P.2d 281, 293 (Alaska 1980).

[162] B. Ostrager & T. Newman, Handbook on Insurance Coverage Disputes § 8.08(a) (2d ed. 1988) (citing Carter v. Aetna Casualty & Sur. Co., 473 F.2d 1071, 1077 (8th Cir. 1973); Daniels v. Horace Mann Mut. Ins. Co., 422 F.2d 87, 89 (4th Cir. 1970); Royal Transit, Inc. v. Central Sur. & Ins. Corp., 168 F.2d 345, 348 (7th Cir.), *cert. denied*, 335 U.S. 884 (1948); Roberts v. American Fire & Casualty Co., 89 F. Supp. 827, 832 (M.D. Tenn. 1950), *aff'd*, 186 F.2d 921 (6th Cir. 1951); Alt v. American Family Mut. Ins. Co., 71 Wis. 2d 340, 237 N.W.2d 706, 711 (1976)).

[163] B. Ostranger & T. Newman, *supra* note 162, § 8.04(b), at 245 (citing Travelers Ins. Co. v. Chicago Bridge & Iron Co., 442 S.W.2d 888, 903 (Tex. Civ. App. 1969) (allowing coverage); Gibbs v. St. Paul Fire & Marine Ins. Co., 22 Utah 2d 263, 451 P.2d 776,

insurance law suggests that whether investigative expenses are covered depends on whether a reasonable, prudent person would be expected to investigate the potential claim in the face of the likelihood that a claim would eventually be brought.[164]

In most instances, policyholders should look to their insurance companies for investigative services.[165]

B. Duty To Defend

Although the standard form pre-1966 CGL policies required insurance companies to defend any suit against the policyholder,[166] the standard form 1966 CGL policies contain a slightly different defense provision: "[The company] shall have the right and duty to defend any suit against the insured seeking damages on account of . . . bodily injury or property damage even if any of the allegations of the suit are groundless, false or fraudulent."[167]

Although the administrative actions taken by environmental regulatory authorities may not be "suits" in the narrow, technical sense of the word, governmental administrative actions such as the issuance of potentially responsible party (PRP) letters are indisputably assertions of liability against the policyholder since

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778 (1969) (denying coverage)).

[164] R. KEETON & A. WIDISS, *supra* note 146, § 9.1(c), at 991-93. The treatise suggests that the following three factors be evaluated: "(1) [T]he degree of probability that a claim will be subsequently asserted, (2) whether such a claim will be within the scope of the liability coverage or the somewhat broader scope of the insurer's obligation to provide a defense, and (3) the potential advantages to be derived from advance preparations to meet such a claim." *Id.* at 991.

[165] J. BERKELEY, AVOIDING COMMERCIAL INSURANCE PITFALLS: A GUIDE FOR CORPORATE COUNSEL AND BUSINESS 87 (1987) (citing Security Ins. Co. v. Wilson, 800 F.2d 232, 235 (10th Cir. 1986) (holding that insurance company had no duty to investigate where claim was excluded by clear and unambiguous policy language); Nautilus Virgin Charters, Inc. v. Edinburgh Ins. Co., 510 F. Supp. 1092, 1101 (D. Md. 1981) (same); CNA Casualty v. Seaboard, 176 Cal. App. 3d 598, 605-06, 222 Cal. Rptr. 276, 278 (1986) (finding that primary carrier had duty to investigate and evaluate facts in complaint prior to rejecting tender of defense); California Shoppers, Inc. v. Royal Globe Ins. Co., 175 Cal. App. 3d 1, 15-31, 221 Cal. Rptr. 171, 176-85 (1985) (holding that duty to defend was breached by Royal Globe's failure to make further inquiry upon receiving summons and complaint naming policyholder)).

[166] *See* Commercial Union Ins. Co. v. Pittsburgh Corning Corp. 553 F. Supp. 425, 429 (E.D. Pa. 1981) (stating that newer policies have been changed to remove that duty).

[167] S. MILLER & P. LEFEBVRE, *supra* note 14, at 411.

drastic legal consequences may flow from these administrative actions. Where, for example, policyholders do not comply with governmental directives made in administrative actions, formal litigation in the courts is likely, and therefore an immediate investigation of the merits of a claim is necessary.[168]

The policyholders' contention that the term "suit"[169] covers both judicial actions against the policyholder and the governmental administrative actions in which a policyholder has been designated a potentially responsible party has been litigated in a number of cases.[170] In *New Castle County v. Hartford Accident & Indemnity Co.*,[171] the court ruled that the insurance companies were obligated to defend New Castle County, the policyholder, against assertions of environmental liability arising from two polluted landfills: "[T]he Insurers are required to defend any action which potentially states a claim which is covered under the policy."[172]

It has been held that in order to deny the policyholder a

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[168] Environmental actions against policyholders are usually initiated by a PRP letter. *See* Fireman's Fund Ins. Co. v. Ex-Cell-O Corp., 662 F. Supp. 71, 74-76 (E.D. Mich. 1987) (coverage should hinge on potential actions, not actual filing of complaint).

[169] Since the word "suit" comes from equity, the use of an ancient equitable concept in the standard form policy does not square with the present contention of the insurance industry that the word "damage" used elsewhere in the policy form is limited to damages at law and does not encompass equitable damages. *See* BLACK'S LAW DICTIONARY 1286 (5th ed. 1979) (defining "suit"). Given their interpretations, (a) the insurance companies would defend suits in equity, but not pay equitable judgments, and (b) would not defend actions at law, but would pay judgments at law.

[170] *See, e.g.*, Detrex Chem. Indus. Inc. v. Employers Ins., 681 F. Supp. 438, 445-46 (N.D. Ohio 1987) (holding that PRP letters to policyholder did not meet attributes of suit; EPA must first resort to court order); Fireman's Fund Ins. Co. v. Ex-Cell-O Corp., 662 F. Supp. 71, 72-76 (E.D. Mich. 1987) (not necessary that traditional lawsuit be filed; coverage hinges on actual or threatened use of any legal process to coerce payment by policyholder); *see also* Solo Cup Co. v. Federal Ins. Co., 619 F.2d 1178, 1183-85 (7th Cir.) (obligation to defend once policyholder is potentially liable), *cert. denied*, 449 U.S. 1033 (1980); 685 F. Supp. 1321 (D. Del. 1988) (decision on merits), *appeal docketed*, Nos. 89-3814, 89-9012, & 90-3030, consolidated by orders of Jan. 18 & 24, 1990 (3d Cir.); New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359, 1365-66 (D. Del. 1987) (duty to defend when remedial liability could lead to legal liability); United States Fidelity & Guar. Co. v. Specialty Coatings Co., 180 Ill. App. 3d 378, 535 N.E.2d 1071, 1075 (1989) (duty to defend arises with potential liability) *reh'g denied*, 545 N.E.2d 133 (Ill. 1989).

[171] 673 F. Supp. 1359 (D. Del. 1987).

[172] *New Castle County*, 673 F. Supp. at 1367.

defense, the insurance company must show that there is no possibility, either legal or factual, under which it could in the future be obligated to indemnify the policyholder.[173] If there is any potential coverage or possibility of coverage, the insurance company must defend.[174]

Furthermore, the duty to defend is independent of the obligation to indemnify the policyholder.[175] The insurance company is obligated contractually to defend even if the underlying allegations are groundless, false, or fraudulent, and any doubts as to the underlying allegations are to be resolved in favor of the policyholder.[176]

In Mississippi, the rule is well established that "[t]he insurer's ultimate liability is not the criterion for determining whether the insurer is obligated to defend."[177] The duty to defend is determined "by the allegations of the complaint in an action against the insured. If those factual allegations bring the action within the circumstances and terms covered by the policy, irrespective of what the actual facts may later prove to be, the company is contractually bound to defend the insured."[178]

In many cases, insurance companies have supported the policyholders' position with respect to the broad scope of the duty to defend. For example, in *Liberty Mutual Insurance Co. v. Continental Casualty Co.*,[179] Liberty Mutual Insurance Company sought and obtained defense costs incurred before a judi-

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[173] Sterilite Corp. v. Continental Casualty Co., 17 Mass. App. 316, 458 N.E.2d 338, 340-41 (1983) *rev'd in part*, 397 Mass. 837, 494 N.E.2d 1008 (1986).

[174] *Id.* at 341.

[175] Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co., 17 Ohio App. 3d 127, 477 N.E.2d 1227, 1230 (1984). *But see* City of Farragut v. Hartford Accident & Indem. Co., 837 F.2d 480 (8th Cir. 1987) (decision without published opinion).

[176] *E.g.*, Norvell Wilder Supply Co. v. Employers Casualty Co., 640 S.W.2d 338, 340 (Tex. Ct. App. 1982) (stating that insurance company must defend even though it may eventually have no duty of indemnification); *see also* Brief of Plaintiff-Appellee Liberty Mutual Ins. Co. at 10-11, Liberty Mut. Ins. Co. v. Continental Casualty Co., 771 F.2d 579 (1st Cir. 1985) (No. 84-1878) (arguing that allegations of failure to inspect pipe were sufficient to state at least potential cause of action within policy's coverage).

[177] Preferred Risk Mut. Ins. Co. v. Poole, 411 F. Supp. 429, 440 (N.D. Miss. 1976) (quoting Southern Farm Bureau Casualty Ins. Co. v. Logan, 238 Miss. 580, 588, 119 So. 2d 268, 271 (1960)), *aff'd*, 539 F.2d 574, 574 (5th Cir. 1976).

[178] *Poole*, 411 F. Supp. at 440.

[179] 771 F.2d 579 (1st Cir. 1985).

cial action had been filed against the policyholder. Liberty successfully argued that (1) the defense had to begin from the day the policyholder was first informed by the underlying claimants' counsel that the policyholder could be held liable, and (2) the pre-lawsuit defense work was just as important to the policyholder's defense as the work done after the judicial complaint was formally filed.[180]

In an environmental pollution insurance coverage case, *Fireman's Fund Insurance Co. v. Rogerson*,[181] Fireman's Fund Insurance Company also affirmed the principle that the duty to defend is broader than the coverage obligation:

> [I]ndeed, so broad is the duty to defend that "[i]n order for the duty of defense to arise, the underlying complaint need only show, through general allegations, a possibility that the liability claim falls within the insurance coverage. There is no requirement that the facts alleged in the complaint specifically and unequivocally make out a claim within the coverage."[182]

Senior executives in the insurance industry have also recognized that insurance companies should defend government environmental claims at the earliest stage possible:

> A growing number of cases are recognizing the unusual nature of superfund actions, where a failure to become involved in negotiations prior to the filing of a suit can have severe repercussions, among them the imposition of joint and several liability and treble damages. To wait for a lawsuit in the face of this is senseless and counterproductive to both sides' interests.[183]

Since insurance companies maintain that their policyholders

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[180] *Liberty Mut.*, 771 F.2d at 586.

[181] No. 85-0916-Y (D. Mass. 1985), *reported in* Hazardous Waste Litigation Rep. 7,777 (Aug. 5, 1985).

[182] Memorandum of Plaintiff Fireman's Fund Ins. Co. in Support of Its Motion for Summary Judgment As to Count IX of Its Complaint, Fireman's Fund Ins. Co. v. Rogerson, No. 85-0916-Y (D. Mass. 1985), *reported in* Hazardous Waste Litigation Rep. 7,777, 7,824 (Aug. 5, 1985) (citations omitted).

[183] Cheek, Graham & Wardzinski, *Insurance Coverage for Superfund Liability Defense and Cleanup Costs: The Need for a Non-Litigation Approach*, 19 ENVTL. L. REP. (Envtl. L. Inst.) 10,203, 10,205 (May 1988). Mr. Cheek now says that this article does not represent his views. Affidavit of Leslie Cheek III, dated April 19, 1990, at 3, New Castle County v. Continental Casualty Co.(3d Cir.) (Nos. 89-3814, 89-9012, & 90-3030).

should have a defense in environmental actions, the Mississippi courts should agree.

V. Are Cleanup Costs Covered "Damages"?

The term "damages" is used in the coverage provision of the standard form CGL policy:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as *damages* because of . . . bodily injury or . . . property damage to which this [insurance] applies, caused by an occurrence and the company shall have the right and duty to defend any suit against the insured seeking *damages on account of such bodily injury or property damage* . . . .[184]

The insurance companies claim that cleanup costs under CERCLA and other response costs are restitutionary, equitable, or both; their insurance policies, they contend, cover only legal damages and hence do not cover equitable or restitutionary relief.[185] Conversely, the policyholders contend that the specific policy terms "all sums" and "damages" are unqualified and provide coverage for cleanup costs.

A. Drafting History

There is a massive and well documented history detailing the development of standard form policies. No insurance company has ever purported to find a single document in the massive drafting history of the 1966 standard form CGL policy stating, or even hinting, that there is any basis for the insurance

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[184] S. Miller & P. Lefebvre, *supra* note 14, at 411.

[185] If one were to agree that cleanup costs were not covered by the indemnity provision, they should nevertheless be covered as defense costs. *See* B. Ostrager & T. Newman, *supra* note 162, § 8.04(a) ("duty to defend may include the costs of investigating CERCLA claims"). Cleanup costs could also be covered as loss mitigation costs. *See* Globe Indemn. Co. v. California, 43 Cal. App. 3d 745, 751, 118 Cal. Rptr. 75, 79 (1974) (policies should cover not only cost of damages to property but also sums spent mitigating that damage); Aronson Assocs., Inc. v. Pennsylvania Nat'l Mut. Casualty Ins. Co., 14 Pa. D.&C. 3d 1 (Pa. 1977) (insurance company was obligated under indemnity provision to reimburse policyholder for expenses incurred when policyholder tried to prevent further contamination of water supply by leakage of gasoline), *aff'd*, 272 Pa. Super. 606, 422 A.2d 689 (1979).

industry's new position that it only provides coverage for damages "at law." There is no historical support for the contention that the word "damages" in the standard form CGL policy is a coverage-limiting word.[186]

Clearly, cleanup costs of pollution were included within the scope of coverage under early CGL policies. A provision inserted by the insurance industry in 1966 and deleted in 1973 expressly required loss mitigation by the policyholder as a condition of the policy.[187] Also, although early policy forms used the phrase "damages at law," the words "at law" were later dropped.[188] Certainly this change is strong evidence of an intent to not restrict coverage to damages at law.[189] The minutes of an Insurance Rating Board (IRB)[190] meeting in 1969 reveal the insurance industry's explicit recognition that standard CGL policies clearly provided coverage for environmental cleanup costs. In connection with offshore oil spill incidents, the General Liability Governing Committee (GLGC) of the IRB observed that "*damages, including the cost of cleanup*, may be catastrophic" and that consideration should be given to excluding such claims from CGL coverage.[191] The members of the GLGC clearly understood that cleanup costs were covered under the CGL policies, or they

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[186] *See* Dairyland Ins. Co. v. Ward, 83 Wash. 2d 353, 517 P.2d 966, 969 (1974) (en banc) (court found it "highly unlikely" that policyholder would reasonably believe that general coverage provision contained exclusion).

[187] G. Bean, *supra* note 37.

[188] Taylor, *The Liability Imposed by Law*, INS. COUNS. J., Oct. 1945, at 38, 40.

[189] *See* Fireguard Sprinkler Sys., Inc. v. Scottsdale Ins. Co., 864 F.2d 648, 651 (9th Cir. 1988) (citing Royal Indemn. Co. v. John F. Course Lumber Co., 245 F. Supp. 707, 711 (D. Or. 1965) ("words deleted from a contract may be the strongest evidence of the intention of the parties"); *see also* 3 A. CORBIN, CORBIN ON CONTRACTS, § 564, at 298 (1967) (coverage restrictions that were expressly considered and rejected by policy drafters will not be read into the policy *sub silentio*); Vargas v. Insurance Co. of N. Am., 651 F.2d 838, 841 (2d Cir. 1981) (consider available drafting choices); Aetna Casualty & Sur. Co. v. Haas, 422 S.W.2d 316, 320 (Mo. 1967) (consider acts of parties when evaluating intent); Mazzilli v. Accident & Casualty Ins. Co., 35 N.J. 1, 7, 170 A.2d 800, 804-07 (1961) (construe exclusions narrowly).

J. APPLEMAN, *supra* note 1, § 7403, at 324. "When an insurer considered and rejected alternative or more precise language that would have put an issue beyond reasonable doubt, a policy will be construed against the insurer." *Id.*

[190] The Insurance Rating Board was a predecessor of ISO.

[191] Agenda and Minutes, Meeting of the GLGC, Insurance Rating Board (Oct. 28, 1969) (emphasis added).

would not have considered excluding such claims from coverage.

B. Industry Practice

Of course some of the most useful support for the proposition that cleanup expenses are covered can come in litigation. Recently an insurance company explained the scope of its coverage as extending to payments for cleanup costs, stating that "if an accidental [policyholder] pollution spill damaged the beach of a hotel, and the hotel sued [the policyholder] for money damages measured by its costs of cleaning the beach, Travelers would, subject to the other policy terms and conditions, provide coverage for such damages."[192]

C. Recent Submissions to Congress

Documents submitted to Congress show that the insurance industry intended to treat cleanup costs such as those mandated by CERCLA as "damages" under CGL policies. In 1985, the American Insurance Association (AIA), the insurance industry's principal lobbying trade association, prepared a document entitled *Proposal to Reform and Expedite Cleanup under Superfund* for Congressional review.[193] The proposal treats "damages" and "cleanup costs" synomously, referring, for example, to "cleanup costs and other damages,"[194] "cleanup costs and other cognizable types of damages,"[195] and "response costs or other damages at any site."[196]

The insurance industry unsuccessfully attempted to amend CERCLA to include a provision which would have negated the environmental coverage of all insurance policies sold before 1980; this proposal was known as the "Silver Bullet Amend-

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[192] Memorandum Of Law In Support Of Plaintiff Travelers Motion For Summary Judgment (filed Jan. 30, 1989) at 76, Travelers Indem. Co. v. Allied-Signal Inc., 718 F. Supp. 1252 (D. Md. 1989) (No. JFM-88-99).

[193] American Insurance Association, Proposal to Reform and Expedite Cleanup under Superfund (unpublished document).

[194] *Id.* at 22.

[195] *Id.* at 29.

[196] *Id.* at 56.

ment."[197] One insurance executive, in commenting, suggested that although the attempted amendment narrowly failed, its rejection indicated "that the insurance industry will not be able to solve its problems statutorily at the PRP's expense."[198] The proposed Silver Bullet Amendment would have been unnecessary if cleanup costs were not covered in the first place.

D. The Inconsistent Litigation Position of the Insurance Industry

Insurance industry giants have successfully maintained that cleanup and other response costs are covered "damages" under CGL policies.[199] In *Compass Insurance Co. v. Cravens, Dargan & Co.*,[200] Cravens, Dargan & Company recovered cleanup costs from another insurance company that sold comprehensive general liability insurance to the State of Wyoming. In its brief to the Supreme Court of Wyoming, Cravens-Dargan rejected the other insurance company's argument that "response costs" are not "damages" under the standard form comprehensive general liability policy.[201] Cravens-Dargan argued that two earlier decisions holding that response costs were not damages were inapplicable.[202] Cravens-Dargan stated: "[T]here is better-reasoned law elsewhere which supports the decision of the trial court [that response costs are covered]."[203] Cravens-Dargan concluded its plea for coverage as follows:

> Taken to its logical extension, Appellant's [the insurance company] argument would mean that if an insured cleans up the

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[197] Cheek, Graham & Wardzinksi, *supra* note 183, at 10,208.

[198] *Id.* at 10,203.

[199] Brief of Plaintiffs-Appellees, Upjohn Co. v. New Hampshire Ins. Co., 178 Mich. App. 706, 444 N.W.2d 813 (1989) (No. 99-969); Memorandum of Law In Support of Plaintiffs' Motion for Summary Judgment, Centennial Ins. Co. v. Lumbermens Mut. Casualty Co., 677 F. Supp. 342 (E.D. Pa. 1987) (No. 86-6064).

[200] 748 P.2d 724 (Wyo. 1988).

[201] Brief of Cravens, Dargan & Co. as Appellee at 8-14, Compass Ins. Co. v. Cravens, Dargan & Co., 748 P.2d 724 (Wyo. 1988) (No. 87-27).

[202] Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325 (4th Cir. 1986) and Maryland Casualty Co. v. Armco, Inc., 643 F. Supp. 430 (D. Md. 1986), *aff'd*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988) are the two principal cases supporting the proposition that CERCLA costs are not "damages."

[203] Brief of Cravens, Dargan & Co., *supra* note 201, at 9.

> pollution for which it is responsible, thereby eliminating the injurious condition which existed, then there is *no* coverage under its policy—but if the insured fails to cleanup the pollution, leaving the water and land in a damaged condition, then there *is* coverage for such damage. Surely such an illogical conclusion should not be allowed. . . .[204]

Similarly, in *Centennial Insurance Co. v. Lumbermens Mutual Casualty Co.*,[205] Centennial Insurance Company successfully argued that cleanup costs are covered damages; in a brief, Centennial stated: "[C]leanup costs and costs incurred to correct a pollution condition may constitute property damages."[206] There are numerous other instances of the same argument by insurance companies.[207]

In moments of candor, the insurance industry continues to recognize that cleanup costs are properly within the scope of the CGL policy. For example, in a recent article, a leading insurance executive commented upon court decisions which held that the CGL policies draw a distinction between money judgments paid to third parties and cleanup costs paid as a result of governmental directives; he said that "from the insured PRP's standpoint such decisions completely ignore the expectations of the [policyholder] that should be the first rule of interpretation. Most [policyholders] would never have expected, indeed rarely understand such distinctions."[208]

However, the best argument for coverage is the simple argument for equal treatment. Insurance companies expect coverage for cleanup costs under CGL policies when they face other insurance companies, and therefore their policyholders should be able

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[204] *Id.* at 14-15 (emphasis in original).

[205] 677 F. Supp. 342 (E.D. Pa. 1987).

[206] Memorandum of Law In Support Of Plaintiffs' Motion For Summary Judgement at 5, Centennial Ins. Co. v. Lumbermens Mut. Casualty Co., 677 F. Supp. 342 (E.D. Pa. 1987) (No. 86-6064).

[207] Brief of United States Fidelity & Guar. Co. in Support of Its Motion for Summary Judgment at 24, United States Fidelity & Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139 (W.D. Mich. 1988) (No. K85-415); Brief of First State Insurance Co. and Lloyds of London at 32, Upjohn Co. v. New Hampshire Ins. Co. 178 Mich. App. 706, 444 N.W.2d 813 (1989) (No. 99-969).

[208] Cheek, Graham & Wardzinski, *supra* note 183, at 10,206.

to expect coverage.[209]

VI. Conclusion

Risk managers and corporate counsel should never routinely assume that particular policies do not cover pollution claims or costs incurred in connection with environmental problems. Even lawyers who regularly represent insurance companies have acknowledged: "Given existing case law, one would be foolish not to seek coverage under almost all old general liability policies."[210]

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[209] Most recently, a Pennsylvania court held that under Missouri law cleanup costs are covered "damages" as that term is used in the standard form CGL insurance policy. The decision of the court in Jones Truck Lines v. Transport Ins. Co., No. 88-5723, slip op. at 13 (E.D. Pa. June 27, 1989) was that the cleanup activities were conducted for the purpose of mitigating further damage and therefore are covered. *Id.*; *see* C.D. Spangler Constr. v. Industrial Crankshaft & Eng'g Co., 326 N.C. 133, 383 S.E.2d 557 (1990); Minnesota Mining and Manufacturing v. Travelers Indem. Co., Nos. C4-881931, C9-88-2296 and C1-88-2244 (Minn. June 8, 1990); Boeing Co. v. Aetna Cas. & Sur. Co., 113 Wash. 2d 869, 784 P.2d 507 (1990), *pet. for reh'g denied*; *see also* New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1364, 1367 (Del. 1987) (cleanup costs are covered) (*appeal pending*, No. 89-3814, 89-9012, & 90-3030 (3d Cir.)); Aerojet-General, Inc. v. San Mateo County Super. Court, 209 Cal. App. 3d 973, 257 Cal. Rptr. 621, 626-28 (Cal. Ct. App. 1989) (holding that damages include the cost of environmental cleanups ordered by the government), *review denied*, No. A042785 (Cal. Aug. 10, 1989); CPS Chem. Co. v. Continental Ins. Co., 222 N.J. Super. 175, 183, 187, 536 A.2d 311, 312, 318 (App. Div. 1988) (monetary assessment by state agency was "damages"); Boeing Co. v. Aetna Casualty & Sur. Co., 113 Wash. 2d 869, 784 P.2d 507, 515 (1990) ("plain meaning of damages does not distinguish between sums awarded on a 'legal' or 'equitable' basis").

[210] Jernberg & Furse, *supra* note 28, at 48.

Mississippi Law Journal

Published by Students at the University of Mississippi School of Law

VOLUME 59 WINTER 1989 NUMBER 3

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COMMENTS

NECESSITY OF ENVIRONMENTAL IMPACT STATEMENTS FOR STREAM RECHANNELIZATIONS

I. Introduction

Channelization refers to the transformation of natural, free-flowing rivers and streams into unsightly, man-made canals. The process encompasses the straightening of meandering streams, removal of bank vegetation, deepening of shallows, and, frequently, clearing of adjoining forests.[1] Federal, state, and local agencies have channelized rivers for more than 150 years to improve navigation, to relieve flooding, and to satisfy landowners wanting to drain wetlands for agriculture.[2] An estimated 200,000 miles of waterway have already undergone channelization, and many interests apparently plan to perform similar work on thousands of additional miles.[3] Long a scourge of environmental

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[1] Harnik, *Channelization: Streamlining Our Nation's Rivers*, Environmental Action, March 4, 1972, at 3.

[2] McConnell, *Opinion-Channelization*, Water Log, July-Sept. 1983, at 4. For an example of flooding that led to channelization, see Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972). Proponents envisioned channelization as a solution to serious flooding that caused myriad hardships for residents of a rural, impoverished watershed. *Id.* at 361. Stream overflows frequently inundated 10,000 acres of crops and pastureland, causing a 50 percent drop in the value of crops once every five years. *Id.* Flooded roads created problems ranging from interruptions in school bus routes to irregular feeding of farm animals. *Id.* Flooding and rainfall also led to health hazards by causing septic tank overflows. *Id.*

[3] McConnell, *supra* note 2, at 4.

groups,[4] channelization is blamed for bank erosion, downstream flooding, disappearing wetlands, depletion of fisheries, and damage to wildlife habitat.[5]

No matter how radical a change is wrought upon a stream by channelization, the river inexorably returns to a more natural state with a concomitant improvement in its ecosystem.[6] Because of the reversion, the navigational problems, flooding, and other inconveniences presumed to accompany an unchecked, free-flowing stream may recur and thus encourage agencies to perform second channelizations, or rechannelizations, on previously channelized streams. Consequently, the sheer number of channelized rivers[7] virtually assures that the issue of rechannelization will arise more frequently in the future. This comment focuses on the applicability of the National Environmental Policy Act (NEPA)[8] toward rechannelization. Particularly, it attempts to answer the question of whether agencies must prepare an environmental impact statement (EIS) before rechannelizing a river. Section 102(2)(C) of NEPA directs federal agencies to compile an EIS concerning "every recommendation or report on proposals for legislation and other major Federal actions *significantly affecting the quality of the human environment.*"[9] An EIS must examine the environmental impact of a proposed action,[10] the unavoidable adverse environmental effects,[11] the alternatives to the action,[12] relationships between "short-term uses" of the environment and maintenance of "long-term productivity,"[13] and any "irreversible and irretrievable commitments of resources" that would be involved in the action.[14]

Part II of this comment chronicles the history and purpose behind NEPA before outlining the NEPA procedures leading to the preparation of an EIS. Part III reviews judicial decisions triggered by disputes over the need of EIS's for stream channelizations and rechanneliza-

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[4] *E.g.*, Sierra Club v. Bergland, 451 F. Supp. 120, 122 (N.D. Miss. 1978) (environmental group seeking injunction to stop channelization of Tippah River).

[5] McConnell, *supra* note 2, at 4.

[6] *E.g.*, The Commercial Appeal, Oct. 7, 1989, at A16, col. 1. The Tuscumbia River in western Tennessee was channelized more than 40 years ago but reverted to its natural channel in subsequent years. *Id.*

[7] McConnell, *supra* note 2, at 4.

[8] 42 U.S.C. §§ 4321-4370 (1982).

[9] *Id.* § 4332(2)(C) (emphasis added).

[10] *Id.* § 4332(2)(C)(i).

[11] *Id.* § 4332(2)(C)(ii).

[12] *Id.* § 4332(2)(C)(iii).

[13] *Id.* § 4332(2)(C)(iv).

[14] *Id.* § 4332(2)(C)(v).

tions. Part IV concerns federal agencies' regulations and their potential effect on rechannelization EIS's. Part IV further suggests novel methods of resolving claims that rechannelizations should be spared the strict scrutiny that NEPA imposes on other projects.

II. Purposes and Procedures of NEPA

An anxious nation grew increasingly concerned during the 1960's over the environmental harm flowing from the post-World War II population explosion, industrial expansion, and seemingly rapacious exploitation of natural resources.[15] Congress responded throughout the decade with bills seeking to establish and implement natural resource protection policies before finally passing NEPA in 1969.[16] Congressional debate over NEPA reflected the public's revulsion at the disintegration of the nation's natural environment[17] and the conviction that a comprehensive, nationwide response was necessary.[18] Reciting a litany of environmental problems, the late United States Senator Henry Jackson, Senate author of NEPA, summed up the frustration: "The inadequacy of present knowledge, policies and institutions is reflected in our nation's history, in our national attitudes, and in our contemporary life. It touches every aspect of man's existence. It threatens, it degrades, and destroys that quality of life which all men seek."[19] In a statement so lofty in purpose that it belied the despair behind NEPA's framers, Congress declared that the purpose of NEPA was "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[20]

Congress designed NEPA to pursue the Act's intrinsic environmental protection policy by establishing two goals.[21] First, NEPA strives to compel agencies to "consider every significant aspect of the environmental impact of a proposed action."[22] Congress wished for fed-

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[15] Note, *New Approach to Review of NEPA Findings of No Significant Impact*, 85 Mich. L. Rev. 191, 191 (1986).

[16] 2 F. Grad, Treatise on Environmental Law, §§ 9.01, 9-28 to -30 (1989).

[17] Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 Rutgers L. Rev. 230, 244-45 (1970).

[18] 2 F. Grad, *supra* note 16, § 9-29.

[19] S. Rep. No. 296, 91st Cong., 1st Sess. 8 (1969).

[20] 42 U.S.C. § 4331(a) (1982).

[21] Baltimore Gas & Elec. Co., v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983).

[22] *Baltimore Gas*, 462 U.S. at 97 (quoting Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. 435 U.S. 519, 553 (1978)).

eral officials to take a "hard look" at environmental consequences before deciding whether to proceed with an action.[23] Second, compliance with NEPA assures the public that agencies will weigh environmental concerns in deliberating proposed actions.[24] These goals are accomplished through the so-called "action-forcing" provisions of section 102(2),[25] which provide for EIS's by federal agencies' pursuing actions that significantly affect the environment.[26] NEPA applies to all federal agencies, including those like the United States Army Corps of Engineers, that are geared toward developing natural resources.[27] The Council of Environmental Quality (CEQ), created as part of NEPA,[28] promulgates binding regulations[29] that direct agencies in complying with section 102(2).[30] However, agencies are allowed to develop internal procedures to supplement CEQ regulations.[31]

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[23] *Baltimore Gas*, 462 U.S. at 100. In emphasizing NEPA's role in an agency's decision making process when pondering a project, the Court said: "Congress did not enact NEPA, of course, so that an agency would contemplate the environmental impact of an action as an abstract exercise." *Id.*

[24] *Id.* at 97. (quoting Weinburger v. Catholic Action of Hawaii, Peace Education Project 454 U.S. 139, 143 (1981)).

[25] 40 C.F.R. § 1500.1(a) (1989). The Council on Environmental Quality (CEQ) described section 102(2) as "action-forcing provisions' to make sure that federal agencies act according to the letter and spirit of the Act." *Id.*

[26] *See supra* notes 9-14 and accompanying text.

[27] 42 U.S.C. § 4332(2) (1982). All agencies must comply with the statute, including its EIS mandate, unless compliance would unavoidably conflict with other statutory authority. Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma, 426 U.S. 776, 788 (1976).

NEPA also governs the activity of private, local, and state entities that apply for federal permits, leasing, or funds. S. NOVICK, D. STEVER & M. MELLON, 1 LAW OF ENVIRONMENTAL PROTECTION § 9.01[2][a] n.5 (1987) [hereinafter ENVIRONMENTAL PROTECTION]. "Federal action," as used in 102(2)c for triggering EIS's, extends beyond agencies themselves to any action permitted or approved by agencies. Sierra Club v. Morton, 514 F.2d 856, 875 (D.C. Cir. 1975), *rev'd on other grounds sub nom.* Kleppe v. Sierra Club, 427 U.S. 390, 415 (1976).

NEPA also applies to development-oriented agencies even if the preparation of EIS's interferes with their projects. Note, *supra* note 15, at 195.

[28] 42 U.S.C. § 4342 (1982).

[29] 40 C.F.R. §§ 1500-1508 (1989).

[30] *Id.* § 1500.3. Originally authorized only to issue advisory guidelines, CEQ gained authority to promulgate binding regulations by executive order of President Carter. 42 Fed. Reg. 26,967 (May 25, 1977).

[31] *Id.* § 1507.3. Within eight months of the publication of the CEQ regulations and five months of the creation of an agency, whichever is later, the agency must adopt its own supplemental procedures. *Id.*

When confronted with a suit challenging individual agency regulations, courts must determine whether the agency rules carry out the legislative purpose behind NEPA.

CEQ rules specify that agencies must first develop an environmental assessment (EA),[32] a concise document containing analyses used to determine whether an EIS is necessary.[33] An EA, as well as an EIS, can be dispensed with when the proposed project fits within a genre of work that the individual agency classifies as a "categorical exclusion" because it normally does not significantly affect the environment.[34] Logically, an agency may also forgo an EA if it has already decided to prepare an EIS.[35] If an EA is prepared and it leads to a conclusion that no EIS is warranted, an agency must then prepare a "finding of no significant impact" (FONSI) explaining its decision.[36] On the other hand, if an EIS is prepared, CEQ regulations require the document both to discuss fully the significant environmental effects and to inform the public and decisionmakers of alternatives with less adverse consequences.[37] After preparation of a draft EIS, comments should be sought from other federal[38] and state agencies.[39]

Revealing the pervasiveness of EIS's, the CEQ recorded the preparation of 521 such documents in 1986.[40] The volume of NEPA-related litigation indicates that opponents of environmentally senstive gorvernment projects favor even more EIS's. The CEQ recorded 1,203 NEPA suits from 1976 to 1985, with actions challenging agencies' fail-

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Comment, *Supplements to Environmental Impact Statements: Implementation of the Standards Set by the Council on Environmental Quality*, 35 Me. L. Rev. 111, 117 (1983).

[32] 40 C.F.R. § 1508.9 (1989).

[33] *Id.* An environmental assessment, (EA), besides being less comprehensive than an EIS, serves a different purpose than an EIS. Sierra Club v. Marsh, 769 F.2d 868, 875 (1st Cir. 1985). An EA merely identifies and assesses possible environmental effects of projects. *Id.* EA's serve only as mechanisms for assessing the need for an EIS and do not weigh environmental concerns or balance other project pros and cons. *Id.*

[34] 40 C.F.R. § 1508.4 (1989). It states in pertinent part:

> 'Categorical exclusion' means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

Id.

[35] *Id.* § 1501.3(a).

[36] *Id.* § 1508.13.

[37] *Id.* § 1502.1.

[38] *Id.* § 1503.1(a)1.

[39] *Id.* § 1503.1(a)2.

[40] Council on Environmental Quality, 1986 Council on Envtl. Quality Ann. Rep. 247. The busiest producers of EIS's were the Department of Transportation (150), Department of Interior (98), and Army Corps of Engineers (91). *Id.*

ure to prepare an EIS being the most common, and suits questioning the adequacy of EIS's the second most frequent.[41] While NEPA litigation is not a significant portion of all the suits against the United States, it does represent the largest portion of environmental legal actions against the government.[42] Legal commentators emphasize the importance of judicial enforcement of agencies' compliance with NEPA, noting that the Act relies on individual agencies to assess environmental ramifications of their actions instead of creating a specialized agency for such functions.[43]

When agency personnel consider the necessity of an EIS as they stand upon the brink of an action, they are said to be making an "EIS threshold decision."[44] If a party challenges a decision not to assemble an EIS, courts must review the propriety of the threshold decision. Section 102(2)C requires preparation of an EIS when a major federal action would significantly affect the environment.[45] A judicial review, then, of an agency's failure to perform an EIS logically revolves around whether in fact the subject action fits within the section 102(2)C standard mandating an EIS.

The following section of this comment will address the environmental impact of channelization and will review judicial decisions in which courts decided whether such impacts reached the "significantly affect" threshold requiring an EIS.

III. Judicial Treatment of Channelizations and Rechannelizations

As briefly explained earlier, channelization simply denotes those instances where man attempts to impose his will on a natural stream by converting it into a more manageable channel.[46] He does it in brutal style. Bulldozers belching black exhaust push aside vegetation and top-

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[41] *Id.* at 241. A survey of NEPA litigation reveals suits asserting the necessity of EIS's were most common eight of 10 years from 1976 through 1985. *Id.* Suits alleging the inadequacy of EIS's were filed most frequently the remaining two years. *Id.* During these two years, the second most common NEPA suits were those claiming agencies improperly failed to prepare EIS's. *Id.*

[42] Environmental Protection, *supra* note 27, 9-32, 9-33.

[43] *Id.* at 9-31 to -32. CEQ has too small a staff for such duty, leaving it in the hands of courts to ensure agencies perform section 102(2)c procedures. *Id.*

[44] *See* Note, *supra* note 15, at 198-99 (discussing disparate standards of review of threshold decisions).

[45] 42 U.S.C. § 4332(c) (1982).

[46] Harnik, *supra* note 1, at 3.

ple trees bordering the river.[47] Draglines follow in the dozers' wake to carve a new channel to bypass bends and to scoop mud from the river bed to deepen the stream.[48] Cranes then smother whatever flora has survived the bulldozers by dumping spoil on the banks and adjoining land.[49] When the transformation is complete, a passerby will see nothing more than a muddy drainage ditch devoid of vegetation, bends, and shallows.[50] Environmental harms follow quickly. The number and diversity of fish drop drastically;[51] aquatic vegetation diminishes;[52] stream banks stripped of protective vegetation erode and slip into the channel;[53] and wildlife habitat shrinks because of the clearing of forests and drainage of wetlands.[54] Despite the intent of channelization proponents to reduce flooding by enhancing the river's drainage capacity, critics contend that the faster flow in the channel exacerbates flooding along shallow portions of the river downstream.[55]

Not surprisingly, federal courts have found that channelizations produce environmental effects sufficiently significant to require EIS's. In a classic showdown between environmentalists and flood-weary landowners, the United States District Court for the Eastern District of North Carolina enjoined further channelization pending preparation of an EIS in *Natural Resources Defense Council v. Grant*.[56] The Soil Conservation Service (SCS), in conjunction with several local organiza-

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[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] McConnell, *supra* note 2. Studies by the Mississippi Game and Fish Commission revealed a three-year channelization of a stream entering Grenada Lake in North Mississippi caused fish catches to fall 80 to 90 percent in the lake. Sierra Club v. Bergland, 451 F. Supp. 120, 130 (N.D. Miss. 1978).

[52] McConnell, *supra* note 2.

[53] *Id.* Twenty-Mile Creek, a tributary of the Tombigbee River in Northeast Mississippi, spread from 100 feet to 400 to 600 feet in width a decade after channelization because eroded banks slid into the creek. The Commercial Appeal (Memphis), March 26, 1984, at B1, col. 1. The Corps of Engineers spent or obligated $6 million from 1981 to 1984 to fight erosion following a 12-mile channelization of Twenty-Mile Creek. *Id.*

[54] McConnell, *supra* note 2. The Corps of Engineers estimated the loss of 766 acres of forestland and the drainage of 16 acres of wetland habitat for wildlife and waterfowl as part of a proposed 41-mile channelization of the Yocona River in North Mississippi. Draft Environmental Impact Statement, Upper Yocona Watershed Project (May 1981).

In addition to the clearing of the forestland accompanying channelization, the end of seasonal flooding following channelization encourages the subsequent cutting of even more timber and drainage of wetlands for agriculture. McConnell, *supra* note 2.

[55] McConnell, *supra* note 2.

[56] 341 F. Supp. 356 (E.D.N.C. 1972).

tions, proposed to channelize sixty-six miles[57] in the Chicod Creek Watershed[58] to reduce flooding[59] at a cost of $1.5 million.[60] At risk, however, were streams rich in fisheries, as well as wetlands that supported waterfowl, furbearers and other wildlife.[61] The SCS sought to allay environmental fears with measures to mitigate the loss of habitat[62] and claimed it issued environmental documents that were the equivalent of EIS's.[63] The court nonetheless issued an injunction prohibiting further work until the filing of a formal EIS.[64] The court said a project of that cost and magnitude was a "major federal action" as envisioned by NEPA.[65] Then, in language capable of encompassing any channelization, the court ruled that the project certainly would have a significant effect on the environment.[66] It stated: "Any action that substantially affects, beneficially or detrimentally, the depth or course of streams, plant life, wildlife habitat, fish and wildlife, and the soil and air 'significantly affects the quality of the human environment.' "[67]

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[57] *Grant*, 341 F. Supp. at 362.

[58] *Id.* at 361. The 35,100-acre watershed supported 15,600 acres of cropland and 15,500 acres of woodland, including 3,200 acres of swamp hardwoods. *Id.* Of the watershed's 3,000 residents, 75 percent were classified as farmers and all were rural. *Id.*

[59] *Id.* at 362. Farmers planned to complement the channel work by practicing agricultural techniques, including conservation cropping, that would improve drainage and soil. *Id.*

[60] *Id.* at 363. Local sponsors planned to pay a share of costs through Farmers Home Administration loans. *Id.* Landowners incurred $130,000 in debts to create a drainage district, and the SCS spent $209,176 prior to the court's injunction. *Id.*

[61] *Id.* The stream hosted a significant spawning run by herring each spring. *Id.*

[62] *Id.* While the SCS proposed to thin and remove trees on 1,350 acres, it planned to set aside 73 acres of wetland for wildlife and a 12-acre warm-water impoundment. *Id.* The agency also envisioned 11 channel pools and 30 swamp drainage control structures. *Id.* The SCS maintained these measures would soften the disruption in fish populations and destruction of wildlife habitat because of channelization and dumping of spoil. *Id.*

[63] *Id.* at 365. The SCS said it had, among other things, prepared and circulated a detailed statement, weighed the environmental impacts and benefits, adopted alternatives, and consulted other federal and state agencies. *Id.*

[64] *Id.* at 369. As for the issuance of statements similar to an EIS, the court said, "But the fact remains that an environmental impact statement has not been prepared and filed . . . ." *Id.* at 366.

[65] *Id.* at 366-67.

[66] *Id.* at 367.

[67] *Id.* The fish population would have plunged 90 percent, and the forest clearing and drainage of wetlands would have destroyed habitat for waterfowl and forest game. *Id.*

Although the conversion of a nonnavigable river into a barge canal differs from a classic channelization, the two projects breed similar environmental consequences. Environmental Defense Fund, Inc. v. Corps of Engineers, 324 F. Supp. 878, 883 (D.C. Cir. 1971). The *Environmental Defense Fund* court enjoined further dredging of the

Another United States District Court excused the SCS from filing an EIS in *Simmans v. Grant*,[68] but only because the channelization was substantially modified. The SCS planned to deepen and widen an existing channel through eleven miles of the Big Creek Slough in Brazos County, Texas.[69] Critics complained the project would destroy all adjoining stands of trees used by wildlife and eliminate water holes needed by cattle,[70] but the SCS concluded that no EIS was necessary.[71] The court agreed with the SCS, finding that the project would not significantly affect the environment.[72] However, the court conditioned its ruling on the SCS's adherence to a modified design that would reroute the channel away from sensitive habitats[73] and indicated that, without such an assurance, it would be reluctant to excuse an EIS.[74]

The United States District Court for the Northern District of Alabama also recognized the necessity of an EIS for a channelization in *Montgomery v. Ellis*.[75] Although the *Ellis* court considered a challenge to the sufficiency of the EIS prepared by the SCS, it affirmed, as a preliminary matter, that an EIS was required.[76] Finding the EIS inade-

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Oklawana River for the construction of the Cross-Florida Barge Canal until the Corps completed an EIS. *Id.* Without delving into detailed environmental impacts, the court found the project posed significant environmental risks. *Id.* at 882. Therefore, it stopped the cutting of timber, dredging and other activities affecting water, flora and fauna. *Id.* at 883.

[68] 370 F. Supp. 5 (S.D. Texas 1974).

[69] *Id.* at 9. The slough passes through numerous stands of trees, including some that grew in or near the proposed channel. *Id.* The area provides habitat for fauna, offers shade to cattle, and contains water holes that trap fish. *Id.*

[70] *Id.*

[71] *Id.* at 10. The SCS denied the project was either a "major Federal action" or that it would significantly affect the environment. *Id.* Plaintiffs contended the EA used to reach those conclusions failed to consider sedimentation, insecticides and herbicide pollution, and the effect of channelization on adjoining landowners. *Id.*

The court criticized the SCS's failure to prepare a negative declaration with accompanying appraisal in lieu of an EIS. *Id.* at 20. The court did not enjoin channelization until such documents were prepared only because the court conducted a hearing that resulted in a record containing information that should have been in the negative declaration. *Id.* at 21.

[72] *Id.* at 21. The court, however, found it to be a "major" and a "federal" action. *Id.*

[73] *Id.* Under pressure from the United States Department of Interior and Texas Department of Parks and Wildlife, the SCS earlier agreed to steer the proposed channel away from habitats and to carry out a vegetative plan to mitigate wildlife loss and erosion. *Id.* at 11.

[74] *Id.* at 21.

[75] 364 F. Supp. 517 (N.D. Ala. 1973).

[76] *Mongtgomery*, 364 F. Supp. at 520.

quate,[77] the court enjoined channelization until the completion of a satisfactory statement.[78] Furthermore, the court ordered a reappraisal of the project to comply with internal SCS regulations clearly restricting the agency's channelizations to those causing only minor environmental harm.[79]

As explained earlier, a channelized river inevitably returns to a more natural state if remedial channeling is not undertaken.[80] Logically, rechanneling a river after years of inactivity simply leads to a repetition of the harmful environmental consequences associated with the original channelization. Judicial opinions dealing with EIS's and channelization rarely specify whether the stream was previously channelized. An exception is *Sierra Club v. Bergland*,[81] which graphically details the ecological illnesses suffered by channelized rivers and warns of the maladies that would follow rechannelization.[82] In 1966, the SCS channelized fifty-seven miles of the Tippah River from its headwaters in Northeast Mississippi to its confluence with the Tallahatchie River.[83] After Tippah floodwaters frequently inundated surrounding farmland in the early 1970's,[84] the SCS and the Corps of Engineers planned an $800,000 rechannelization of 6.6 miles near the Tallahatchie River.[85] Environmentalists sought an injunction against the work until an EIS was prepared.[86] The court outlined the environmental consequences of the original channelization and the projected damage from the proposed action in finding the project to be a major federal

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[77] *Id.* at 521. The court objected to the absence of physical characteristics of the project, satisfactory benefit-to-cost factors, and consideration of alternative to channelization from the EIS. *Id.* at 521-27. The EIS also improperly recited nonexistent recreational benefits from the channelization. *Id.* at 526-27.

[78] *Id.* at 535.

[79] *Id.* The court cited a SCS memorandum specifying that no channelization should occur unless the project creates only minor or no known adverse environmental effects and the proposal is supported by favorable benefit-to-cost ratios. *Id.* at 534. Despite this internal directive, the SCS proposed to proceed in the face of its own EIS listing major environmental effects. *Id.*

See also Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 349 (8th Cir. 1972) (finding EIS treatment of alternatives to channelization insufficient).

[80] *See supra* note 6 and accompanying text.

[81] 451 F. Supp. 120 (N.D. Miss. 1978).

[82] *See Bergland*, 451 F. Supp. at 124-25, 129-31.

[83] *Id.* at 124.

[84] *Id.* at 125. Flooding disrupted cultivation, cattle grazing, and other uses of at least 5,500 acres in the floodplain. *Id.* Adding to landowners' misery, the frequent flooding washed sand onto land. *Id.*

[85] *Id.* at 122, 129.

[86] *Id.* at 122-23.

action with significant environmental effects.[87] Noting that Tippah's waters eventually flowed through the federally operated Sardis Reservoir, the court recounted the decline in Sardis water quality and fishing in the years following the original channelization.[88] In the Tippah River itself, the concentration of fish fell from 240 pounds per acre with great diversity of species prior to channelization to just five pounds per square acre afterward.[89] Fisheries had risen to 34.2 pounds per acre by 1975, but the court quoted projections that a second channelization would reduce fisheries to immediate post-channelization concentrations.[90] The *Bergland* court concluded that the Corps of Engineers and SCS appeared unsure of the impact of rechannelization and thus granted a preliminary injunction barring further work until an EIS was prepared.[91]

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[87] *Id.* at 129.

[88] *Id.* at 130. The Sardis water remained muddy for three years, in a condition that caused the number of fishermen at Sardis to plunge drastically. *Id.* Similar results followed channelization of streams entering other North Mississippi reservoirs. *Id.* An SCS-Corps of Engineers' channelization of Coldwater and Pidgeon Roost Rivers harmed fishing in Arkabutla Reservoir, and the dredging of Skuna River did the same to Grenada Reservoir. *Id.* Grenada suffered from muddy water for years, and fish catches dropped 80 to 90%. *Id.*

[89] *Id.*

[90] *Id.* Joe Stone, director of conservation for the SCS District, prepared the projection. *Id.* The court also cited reports from other state and federal agencies expressing concern about the environmental effect of rechannelization. *Id.*

[91] *Id.* at 131. In another Mississippi project, the Corps of Engineers researchers projected a diminution in wildlife habitat following the proposed rechannelization of 11.4 miles of Mississippi's Yalobusha River, which was originally channelized in 1954. *Environmental Assessment, Yazoo Headwaters Project, Yalobusha River Maintenance* (Feb. 1987). The project would have caused a 12% reduction in the project area's acreage that is seasonally flooded and thus invaluable habitat for migratory waterfowl. *Id.* at 14. It also would have destroyed 315 acres of woodlands, but the Corps denied that the project would have encouraged the conversion of woodlands to agricultural uses. *Id.* Because of the original channelization, the stream's fisheries consisted almost exclusively of catfish, carp and other species tolerant of silt. *Id.* at 15. This would have remained the same after rechannelization with some loss of spawning areas for such species. *Id.* at 17. Despite reciting the environmental effect of the Yalobusha River project, the Corps nonetheless concluded that the rechannelization would not sufficiently affect the environment so as to warrant an EIS. *Id.* at 33.

The United States Fish and Wildlife Service disputed the Corps' conclusion that the project posed no significant threat to the environment. Letter from Stephen W. Forsythe, acting field supervisor of Fish and Wildlife Service, to Corps of Engineers (Mar. 20, 1987). Contrary to the Corps' findings, the project would reduce fisheries 40%, destroy 290 acres of forested wetland, and induce the clearing of 686 additional acres of wetland. *Id.* at 1. It also would prevent the essential seasonal flooding of 2,900 acres of the best waterfowl wintering area in Mississippi. *Id.* at 2.

IV. Possible Maintenance Exception to NEPA and Necessity of Supplemental EIS for Rechannelization

A. Maintenance

Rechannelization is, by definition, follow-up work on an earlier project, perhaps even one that occurred decades ago. The question, then, might arise as to whether rechannelization is merely maintenance of an ongoing project and, if so, what effect such a designation would have on the need for an EIS. The two federal agencies most active in channelization, the Corps of Engineers and the SCS, adopted internal regulations for complying with NEPA[92] that offer clues to their treatment of this issue. SCS regulations appear to lean toward the preparation of EIS's for rechannelizations. While SCS procedures do not mention rechannelization by name, the agency's rules mandate EIS's for channel realignments and for the deepening or widening of channels where significant aquatic or wildlife habitats would be affected.[93] These rules could easily cover rechannelization.

On the other hand, Corps of Engineers regulations adopted in 1988 might tempt that agency to sidestep EIS's when preparing to rechannelize. The Corps of Engineers' regulations list actions normally requiring an EA, but not necessarily an EIS,[94] and among these are maintenance projects for which environmental impacts will occur that were not examined in the initial EA or EIS.[95] Significantly, the regulations cite as an example "the use of new disposal acres,"[96] a scenario that likely could arise during the disposal of spoil during rechannelization. Both the EA and the EIS are excused for projects that fit one of the Corps of Engineers' categorical exclusions.[97] The procedures list

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[92] *See supra* note 31 and accompanying text. For Corps procedures for implementing NEPA, see 33 C.F.R. § 230 (1989). For SCS rules, see 7 C.F.R. § 650.1-.13 (1989).

[93] 7 C.F.R. § 650.7(a)(1) (1989). Channel realignment includes the construction or rerouting of a channel, including the clearing, snagging, widening and deepening of an existing channel. 7 C.F.R. § 650.4(a) (1989).

[94] 33 C.F.R. § 230.7 (1989).

[95] *Id.* § 230.7(d).

[96] *Id.*

[97] *Id.* § 230.9. This section provides:

> Actions listed below when considered individually and cumulatively do not have significant effects on the quality of the human environment and are categorically excluded from NEPA documentation. *However, district commanders should be alert for extraordinary circumstances which may dictate the need to prepare an EA or an EIS* . . . .
>
> (b) Activities at completed Corps projects which carry out the authorized project purposes. Examples include routine operation and maintenance actions,

among categorical exclusions "[m]inor maintenance dredging using existing disposal sites"[98] and activities at completed projects that carry out project purposes, including routine operation and maintenance.[99]

Just months after the promulgation of these procedures, the Corps of Engineers demonstrated its intention to use these categorical exclusions to justify its refusal to perform an EIS for a rechannelization. In *State ex rel. Moore v. Marsh*,[100] the United States District Court for the Southern District of Mississippi considered a suit alleging that the Corps of Engineers should have prepared an EIS[101] before the 1988 rechannelization of an 11.4 mile stretch of the Yalobusha River in Northwest Mississippi.[102] The flood-control project was intended to increase the river's water flow to a rate that it was authorized to attain during a 1954 channelization.[103] In addition to claiming that the pro-

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general administration, equipment purchases, custodial actions, erosion control, painting, repair, rehabilitation, replacement of existing structures and facilities such as buildings, roads, levees, groins, and utilities . . . .

(c) Minor maintenance dredging using existing disposal sites . . . .

(e) All Operations and Maintenance grants, general plans, agreements, etc., necessary to carry out land use, development and other measures proposed in project authorization documents, project design memoranda, master plans, or reflected in the project NEPA documents.

Id.

The CEQ allows agencies to compile a list of actions that do not individually or cumulatively have a significant impact on the environment and, thus, require no EA or EIS. 40 C.F.R. § 1508.4 (1989). An agency, however, may still perform an EA at its own discretion and "shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." *Id.*

[98] 33 C.F.R. § 230.9(c) (1989).

[99] *Id.* § 230.9(b).

[100] 710 F. Supp. 1488 (S.D. Miss. 1989). The *Marsh* court issued a preliminary injunction against further rechannelization of the Yalobusha River on September 7, 1988, in response to a suit by the State of Mississippi and intervening plaintiffs Mississippi Wildlife Federation and Leflore County Hunting and Fishing Association. *Id.* at 1489. The court made the injunction permanent on March 29, 1989, pending the Corps' preparation of an EIS. *Id.* at 1490.

[101] *Marsh*, 710 F. Supp. at 1491.

[102] *Id.* at 1492. The $1,999,852.90 contract between the Corps and a private company "called" for the contractor to remove 1,292,900 cubic yards of dirt and to perform stone work and turfing. *Id.* at 1498. The Yalobusha River is the primary source and drain of Grenada Lake, a flood-control impoundment built by the Corps of Engineers in 1954. *Id.* at 1491. The river runs 64 miles from Grenada Lake Dam to its juncture with the Coldwater River near Greenwood, Mississippi, where the two rivers form the Yazoo River. *Id.* The enjoined project, officially designated the "Yalobusha River Maintenance Project," involved a section extending from 0.8 miles above the river's mouth to 12.2 miles above the mouth. *Id.* at 1492.

[103] *Id.* The Corps of Engineers wished to increase the water flow in the river to 5,100

ject did not affect the environment significantly enough to warrant an EIS,[104] the Corps of Engineers asserted that the Yalobusha River rechannelization fit both the "routine operation and maintenance"[105] and the "minor maintenance dredging"[106] categorical exclusions to EA's and EIS's.

The court dismissed the Corps of Engineers' finding that the project would not significantly affect the environment,[107] citing the loss of wetlands and sedimentation of the Yazoo River downstream of the project site.[108] In assessing the impact, the court relied in part on factors established by the CEQ for aiding agencies in determining whether a project merits an EIS.[109] The court specifically stated that proximity to wetlands is a consideration under CEQ regulations in finding whether a project would have a significant impact and added that this factor weighed in favor of an EIS for that particular rechannelization.[110] Because any stream rechannelization project site will almost certainly lie in or near wetlands, this CEQ factor strengthens the

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cubic feet per second, which was the stream's targeted drainage capacity of Grenada Lake during the initial channelization in 1954. *Id.* Three decades after the first channelization, sedimentation and shifts in the banks had restricted the flow level to about 3,000 cubic feet per second. *Id.* The Corps of Engineers planned to expand the capacity through the removal of 1,297,000 cubic yards of spoil from the river bottom, the widening of the stream bed from 65 to 80 feet and the clearing of bank vegetation. *Id.* Spoil would have been deposited over 41 acres of wetlands where spoil had also been dumped in 1954. *Id.* Before the project was halted, the Corps of Engineers had completed the intended clearing of 315 acres of woodland. *Id.* The Corps of Engineers had envisioned the project reducing flooding of 800 acres in the rural, agricultural region. *Id.*

[104] *Id.* at 1496. The Corps of Engineers prepared an EA and an accompanying Finding of No Significant Impact (FONSI). *Id.* at 1491.

[105] *Id.* at 1502. The "routine operation and maintenance" exclusion is described in 33 C.F.R. § 230.9(b). *See supra* note 96 and accompanying text.

[106] *Marsh*, 710 F. Supp. at 1502. This categorical exclusion, described at 33 C.F.R. § 230.9(c), applies to "minor maintenance dredging using existing disposal sites." See *supra* note 96 and accompanying text.

[107] *Marsh*, 710 F. Supp. at 1504.

[108] *Id.* at 1505. "Dredging and channel improvements may obviously have a significant impact separate from the original channelization." *Id.* at 1505 n.33. The court noted that all other state and federal agencies with an interest in the project concluded the work posed a "significant impact." *Id.* at 1505. For more detailed description of the impact of the project, see *supra* note 90.

The *Marsh* court also based its rejection of the FONSI on the possibility that rechannelization and other Corps of Engineers activities would produce "cumulative impacts" on the environment. *Id.* at 1505.

[108] *Id.* at 1504.

[110] *Id.* The CEQ lists 10 factors for determining the significance of an impact. 40 C.F.R. § 1508.27(b) (1988). One factor is "unique characteristics of the geographic area such as proximity to . . . wetlands." *Id.* § 1508.27(b)(3).

argument that EIS's must precede such work.

In addition to finding that the project significantly affected the environment, the *Marsh* court also blocked the Corps of Engineers' attempt to sidestep an EIS by pegging the project as one of its categorical exclusions.[111] The court rejected the agency's contention that the rechannelization qualified for the "routine operation and maintenance" and the "minor maintenance dredging" exclusions.[112] The court stated that the Corps could not logically characterize as "routine" or "minor" rechannelizations that involved the dumping of more than 1,000,000 cubic yards of dirt onto disposal sites last used more than thirty years earlier.[113] Even if the work had met the criteria for one of the exclusions, the Corps of Engineers' District Manager "would have clearly erred in not treating the YRMP [project] as an exceptional case."[114] The court stated:

> Categorical exclusions generally are types of projects which do not individually or cumulatively have significant effects on the human environment. In order to prevent a project within such a type from being excluded if it, in fact, does have such an impact, the District Commander is to be alert to this possibility and is to prepare an EIS or EA as appropriate.[115]

Marsh perhaps offers the most direct judicial examination of the necessity of EIS's for rechannelizations. Although the decision does not address in great detail the environmental ramifications of a rechannelization, it nonetheless acknowledges in unequivocal language that a rechannelization of a stream after years of neglect creates environmental effects significant enough to merit an EIS. *Marsh* should also dissuade the Corps of Engineers from succumbing to the temptation to forego EIS's for rechannelizations on the basis of the Corps' recently adopted categorical exclusions. The decisions will undoubtedly evolve into a lethal weapon in the hands of environmental groups demanding

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[111] *Marsh*, 710 F. Supp. at 1507.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* (citing 33 C.F.R. § 230.9 (1988)). The *Marsh* court overruled the agency's classification of the project as a categorical exclusion despite the judiciary's deference to such agency determinations. *Id. But see* West Houston Air Comm. v. FAA, 784 F.2d 702, 705 (5th Cir. 1986) (upholding FAA's categorical exclusion of expansion in air service at airport from necessity of EA). For judicial decisions holding that an agency should have recognized an exception to a categorical exclusion, see Jones v. Gordan, 792 F.2d 821, 828 (9th Cir. 1986) (finding that National Marine Fisheries Service should have prepared EIS before issuing permit for capture of killer whales).

an EIS from those who plan rechannelizations.

Aside from *Marsh*, courts rarely address the effect of NEPA on so-called maintenance projects. Consequently, courts have provided little guidance for determining whether a project is an independent entity with an undisputed need for consideration of an EIS or whether a project is merely maintenance with a less certain need for an EIS. But assuming for purposes of argument that rechannelization is maintenance of the original channelization, a handful of lower federal court opinions demonstrate, either explicitly or implicitly, that such a designation does not shield rechannelizations from EIS's. The United States District Court of Connecticut discussed the relevance of maintenance to EIS's most thoroughly in *Sierra Club v. Mason.*[116] The Corps of Engineers proposed to deepen New Haven Harbor to a depth that it had reached during a harbor improvement project more than twenty years earlier.[117] Accused of violating NEPA for its failure to prepare an EIS,[118] the Corps of Engineers responded that the action was the latest in a series of maintenance works on a project completed prior to the enactment of NEPA.[119] NEPA, the Corps of Engineers argued, exempts maintenance from its coverage.[120] The Corps supported its position by explaining that agencies are required to perform maintenance and their discretion in such situations is limited only to *when* to do the work.[121] The court flatly rejected this argument, saying that such an exemption would "undermine" NEPA.[122] First, the court rebutted the Corps' contention that agencies' only discretion is when to undertake maintenance.[123] The court pointed out that agencies also decide how to perform maintenance, a decision with potentially profound environmental repercussions and thus worthy of NEPA coverage.[124] Second,

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[116] 351 F. Supp. 419 (D. Conn. 1972).

[117] *Mason*, 351 F. Supp. at 421. The Corps proposed to dredge the harbor to 35 feet in depth, a project that would require the extraction of 720,000 cubic yards of spoil. *Id.* The Corps planned to deposit the spoil in Long Island Sound. *Id.* The depth of the harbor, built in 1871, reached 35 feet during a 1948-1950 improvement. *Id.* at 424.

[118] *Id.* at 421.

[119] *Id.* at 424. The Corps had performed periodic maintenance dredging in the harbor and nearby river channels since the harbor improvements. *Id.* at 422.

[120] *Id.* at 424.

[121] *Id.*

[122] *Id.* at 424-25.

[123] *Id.* at 424.

[124] *Id.* In this project, the court stated, a decision as to the method of so-called maintenance involved such an environmentally sensitive decision as how to dispose of one million tons of polluted spoil. *Id.* This requires a consideration of alternatives as envisioned by the EIS mandate, the court ruled. *Id.* at 424-25.

the court found that the Corps' internal regulations at the time provided for EIS's when the agency sought funding for infrequent maintenance.[125]

Other cases do not explicitly address the existence of a maintenance exception. Nevertheless, courts have ordered EIS's for work that was arguably maintenance, and implicit in such decisions is a finding that no maintenance exception exists. Courts have required EIS's for annual dredging of the Mississippi River[126] and maintenance dredging of the Intracoastal Waterway in Florida.[127] As previously noted, the *Bergland* court ordered an EIS for a rechannelization that might conceivably have been called maintenance of a previously constructed channel.[128]

B. The Supplemental EIS

If a rechannelization is capable of classification as maintenance, it is equally plausible to characterize it as the continuation of the original channelization. Because many of the presumed benefits of channelization disappear as the stream returns to a more natural state, a rechannelization is perhaps an inevitable follow-up intended to preserve those benefits. The channelization and subsequent rechannelization might be interpreted as one continuous, uninterrupted project, regardless of the number of years separating the two events. Both the CEQ regulations and the language of NEPA itself direct agencies to consider EIS's for continuous or ongoing projects.[129] Consequently, a rechannelization

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[125] *Id.* at 425. The Corps had last dredged the harbor to this extent 14 years earlier. *Id.*

[126] Wisconsin v. Callaway, 371 F. Supp. 807, 812-13 (W.D. Wis. 1974). The Corps annually dredged the upper Mississippi to maintain a nine-foot channel for navigation. *Id.* at 809. The $700,000 project in 1974 would have entailed the deposit of 700,000 tons of spoil on islands, shoreline, and sloughs. *Id.* Reflecting the concern raised by environmentalists opposed to river channelization, the court enumerated the increased channelization, diminished fisheries, loss of wildlife habitat and other ecological maladies flowing from the deposit of spoil. *Id.* at 809-10.

[127] Save Crystal Beach Ass'n v. Callaway, 8 E.R.C. 1641, 1645 (M.D. Fla. 1975). The Corps planned the $1.04 million dredging, one of a series of periodic maintenance projects, and expected to deposit 312,000 cubic yards of spoil. *Id.* at 1643. The court found an EIS for the entire waterway was not sufficient for this segment. *Id.* at 1645. The court ordered an EIS even though the project was not separately funded or authorized, but was covered by a lump sum for maintenance. *Id.*

[128] *See supra* notes 81-90 and accompanying text.

[129] Among examples of "federal actions" triggering EIS's, the CEQ lists "new and *continuing* activities" 40 C.F.R. § 1508.18(A) (1987) (emphasis added). To fully implement the policies of NEPA, the federal government faces "*continuing* responsibility to

might demand either a supplemental EIS or initial EIS, depending on whether an EIS had been prepared for the original channelization.

Courts frequently order EIS's, either initial or supplemental, in the middle of long-range activities that last for years or even continue indefinitely. Typical of litigation examining ongoing activities is *Louisiana v. Lee*.[130] The *Lee* court overturned a lower court's summary judgment for defendants in a suit challenging the Corps' failure to compile an EIS before renewing six five-year permits for dredging shells along the Louisiana Gulf Coast.[131] The permittees were continuing a dredging operation that had begun more than fifty years earlier.[132] Arguing that no EIS was necessary, the Corps denied that continued dredging posed a significant threat to the environment. The Corps based its position on the ground that damage to the waters had occurred during dredging in the 1950's and that now, in effect, an EIS would be too late.[133] In language tailor-made for the same issue in rechannelizations, the court rejected this argument.[134] The court ruled that the effect of ongoing work can be significant enough to justify an EIS even if it would only prolong environmental damage.[135] If the environmentally disruptive work were halted, the *Lee* Court explained, the waters might regain their ecological health.[136] Remanding the case to the trial court, the appeals court directed the lower court to "compare the projected ecological status of the affected areas if the dredging is continued for another five years with their projected condition if the dredging is halted now."[137]

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improve and coordinate federal plans, functions, programs and resources." 42 U.S.C. § 4331(b) (1982) (emphasis added).

[130] 758 F.2d 1081 (5th Cir. 1985).

[131] *Lee*, 758 F.2d at 1082. The Corps had prepared an EA but concluded no EIS was necessary. *Id.*

[132] *Id.* at 1085-86.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

> This logic is not applicable to the present case. The renewal of these permits will not maintain a status quo, but rather will continue a course of environmental disruption begun years ago. The fact that much damage to the benthic life occurred years ago does not automatically render the effect of the continued dredging insignficant. Such a conclusion would ignore the realities that even a badly damaged body of water may restore itself to ecological health if a disruptive activity is halted and that continued dredging may expand the areas of damage.

Id. at 1086.

[137] *Id.*

Other opinions mirror the *Lee* reasoning. In *Lee v. Resor*,[138] a federal district court interpreted the Congressional intent behind NEPA "to require federal agencies to objectively evaluate their *continuing* projects which have an environmental impact."[139] The United States Court of Appeals for the Sixth Circuit likewise forced the Tennessee Valley Authority to prepare an EIS before continuing a flood control project already one-third completed.[140]

CEQ regulations, binding on all agencies, demand supplemental EIS's when agencies make substantial changes in the action or when significant new information or circumstances surface after the original EIS.[141] A rechannelization raises a substantial likelihood that significant information or circumstances will arise after the original channelization because of the extensive lapse of time between the two projects.[142] An original EIS simply could not have examined all information or circumstances that might attend a second channelization so

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[138] 348 F. Supp. 389 (M.D. Fla. 1972).

[139] *Resor*, 348 F. Supp. at 397 (emphasis added). The court found the Corps should prepare an EIS during the continuance of a 20-year-old program of spraying hyacinths in a river. *Id.*

[140] Environmental Defense Fund v. TVA, 468 F.2d 1164, 1168 (6th Cir. 1972). Federal officials are to approve *continuously* all of the activities, not only in terms of strict economic or technological considerations, but also with reference to broad environmental concerns . . . . Subject only to the limitations of practicability, they are to strive *constantly* to improve federal programs to preserve and enhance the environment. *Id.* at 1174 (emphasis added).

[141] 40 C.F.R. § 1502.9(c)(1) (1989).

> (c) Agencies:
> (1) Shall prepare supplements to either draft or final environmental impact statements if:
> (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
> (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

Id.

For an example of change in action, see Environmental Defense Fund v. Marsh, 651 F.2d 983, 1006 (5th Cir. 1981) (requiring supplemental EIS after Corps changed design and economic projections of Tennessee-Tombigbee Waterway).

Parties challenging an agency's decision not to supplement must satisfy two burdens. They must demonstrate a substantial environmental issue and show that the agency acted unreasonably in failing to supplement. Sierra Club v. Froehlke, 816 F.2d 205, 210 (5th Cir. 1987).

[142] Comment, *supra* note 31, at 116. "Design changes, *long delays*, new ideas and cost-cutting alterations all can make an original EIS obsolete. When this happens, courts usually find that the agency is no longer meeting requirements of NEPA because the original EIS fails to detail sufficiently the 'environmental impact of the proposed action.' " *Id.* (emphasis added).

far in the future. Courts have emphasized agencies' continuing duty under NEPA to gather and evaluate information relating to the environmental impact of their ongoing actions.[143] The continuing duty is especially important when the original EIS covered a series of actions stretching over a decade, the Ninth Circuit Court of Appeals stated in *Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark*.[144] The *Clark* court relied in part on a CEQ advisory suggesting that agencies consider supplementing EIS's for actions that continue more than five years.[145]

To best effectuate the purpose of NEPA, a legal commentator has endorsed the preparation of a single, comprehensive EIS that examines immediate and long-range environmental consequences of related projects that extend over a period of years.[146] This, then, should be followed by supplements analyzing the impacts of subsequent, component parts of the project.[147] Under this scheme, agencies would precede channelizations with EIS's addressing the impacts of both the initial and subsequent channelizations and would then prepare a supplement before any rechannelization. This approach conforms to the intention

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[143] *E.g.*, Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1023 (9th Cir. 1980) (interpreting 42 U.S.C. § 4332(2)(A)-(B)).

Section 1508.18(a) of CEQ regulations requires the NRC to pursue its NEPA responsibilities after the preparation of an initial EIS. People Against Nuclear Energy v. Nuclear Regulatory Comm'n, 678 F.2d 222, 231 (D.C. Cir. 1982). NRC regulation of nuclear reactors is a "continuing activity" subject to NEPA coverage and thus potentially requiring a supplemental EIS. *Id.* The Seventh Circuit found that a supplement was necessary when "new information presents a picture of the likely environmental consequences associated with the proposed action not envisioned by the original EIS." Wisconsin v. Weinburger, 745 F.2d 412, 418 (7th Cir. 1984). The information should present a "seriously different picture of the environmental landscape such that another hard look is necessary." *Id.*; *accord*, Louisiana Wildlife Federation v. York, 761 F.2d 1044, 1051 (5th Cir. 1985).

[144] 720 F.2d 1475, 1480 (9th Cir. 1983). The Department of Interior had filed an EIS for a 10-year program of spraying herbicides in Oregon forests. *Id.* at 1477. A year later an environmental group sued to enjoin the action, claiming there was uncertainty concerning the safety of one of the herbicides. *Id.*

[145] *Clark*, 720 F.2d at 1480 (citing CEQ, *Forty Most Asked Questions Concerning CEQ's National Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,036 (1981)).

The *Southern Oregon* court resolved the case by requiring the Interior Department to consider the uncertainty surrounding the herbicides during annual EA's, which, of course, could result in an EIS if the impact is significant enough. *Southern Oregon*, 720 F.2d at 1481.

[146] ENVIRONMENTAL PROTECTION, *supra* note 27, at 102.

[147] *Id.* CEQ regulations encourage this by suggesting that agencies minimize the difficulties of supplements through "tiering" of EIS's in which subsequent EIS's avoid repetitive discussions of the same issues. 40 C.F.R. § 1502.20 (1987).

of NEPA's congressional architects that actions performed in increments, like single-action programs, be subjected to a strict scrutiny that minimizes environmental mistakes.[148] Despite the expenses and burdens of supplementing EIS's,[149] NEPA mandates compliance with its EIS provisions regardless of "considerations of administrative difficulty, delay or economic cost."[150]

V. Conclusion

Development-oriented agencies such as the Corps and the SCS undoubtedly find EIS's an expensive and time-consuming interference with their duties and just as certainly find it tempting to bypass EIS's when a flood-plagued public and its congressional allies demand rechannelizations. A review of case law and legislative intent behind NEPA, however, shows that rechannelizations should be subject to the same scrutiny, including EIS's, as any other federal project. As courts have found, channelizations, and thus rechannelizations, affect the environment to a degree significant enough to warrant an EIS. To argue that NEPA exempts rechannelizations from EIS's under a maintenance exception or for some other reason is disingenuous and a betrayal of the Act's purpose. NEPA imposes upon agencies a continuing duty to evaluate ongoing actions, a mandate that can be achieved only by a fresh EIS for follow-up channelizations. Congress apparently feared that agencies might circumvent NEPA by carrying out long-range projects in increments without examining the environmental impact of each component. This fear will become a reality if agencies are allowed to except stream rechannelizations from the environmental review achieved through EIS's. Most importantly, the framers of NEPA looked with alarm on a world in the throes of environmental disintegration and directed agencies, through NEPA, to minimize their contribution to the ecological decline. Rechannelization undoubtedly produces environmental harms of the type that spurred Congress into

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[148] Conservation Soc'y of Vermont, Inc. v. Secretary of Transp., 508 F.2d 927, 934 n. 37 (2nd Cir. 1974), *vacated on other grounds sub nom.* Coleman v. Conservation Soc., 423 U.S. 809 (1975).

[149] Novick, *supra* note 27, at 116. "Preparing to supplement is expensive, slows down an ongoing project and can revive or create public criticism of an ongoing project." *Id.*

[150] Calvert Cliff Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

passing NEPA. The spirit and letter of NEPA demand that SCS and the Corps search for ways to avoid that damage by compiling EIS's before rechannelizing.

Michael D. Tapscott

RECENT DECISIONS

Constitutional Law—Sovereign Immunity—Under the Commerce Power, Congress Can Revoke State Sovereign Immunity Through Environmental Legislation

The petitioner state[1] appealed from a ruling[2] that permitted a damage suit[3] against it which arose from the cost to clean up the respondent's polluted property.[4] Although the state contributed to the pollution of the property,[5] the respondent's predecessors primarily contaminated the real estate.[6] The state denied liability to the respondent,

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[1] Petitioner, the Commonwealth of Pennsylvania, took part in a flood control project along a creek previously contaminated by the predecessors of respondent, Union Gas Company. Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2276 (1989).

[2] *Id.* at 2277. The United States Supreme Court granted certiorari on a ruling from the Third Circuit Court of Appeals. *Id.*

[3] *Id.* at 2276-77. The United States brought suit against Union Gas Company under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9604, 9606 (Supp. IV 1986), to recover amounts it had reimbursed to Pennsylvania for the cleanup of hazardous waste seepage from the respondent's former facility. *Union Gas*, 109 S. Ct. at 2276. The respondent filed a third-party complaint against Pennsylvania, asserting that it was liable for a portion of the costs under CERCLA as an "owner or operator" of the property. *Id.*

[4] *Union Gas*, 109 S.Ct. at 2276. The total cleanup cost was $720,000. *Id.*

[5] *Id.* Respondent alleged that "owner or operator" liability under CERCLA existed against the state because Pennsylvania took part in major flood control projects on the polluted property in the 1950's and in 1980 acquired easements along the contaminated creek bank. *Id.* The state struck a large deposit of coal tar while excavating, and it began to seep into the creek. *Id.* The Environmental Protection Agency (EPA) determined that the tar was a hazardous substance and ordered the polluted site cleaned up. *Id.*

[6] *Id.* The predecessors of Union Gas Company had owned and operated a carburetted water gas plant contiguous to the creek from 1890 to 1948, after which time the plant

arguing that the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[7] created state liability only to the United States[8] and that the principle of sovereign immunity precluded state liability to a private entity.[9] On remand from the United States Supreme Court,[10] the United States Court of Appeals for the Third

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was dismantled. United States v. Union Gas Company, 792 F.2d 372, 374 (3d Cir. 1986). The company that owned the contaminated property changed ownership several times before it merged into Union Gas Company in 1978. Brief for Respondent at 3, Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989). The carburetted water gas plant produced coal tar as a by-product, which was deposited near the creek. *Union Gas Co.*, 792 F.2d at 375. In 1953 and 1970 the company sold part of its land near the creek to a local township. *Id.* at 374. In 1908 the borough assigned easements to the property along the creek to the State of Pennsylvania. *Id.* On October 7, 1980, the state excavated the creek and struck a large deposit of coal tar that began to seep into the creek. *Id.* The United States claimed that Union Gas Company and its predecessors deposited the coal tar and that Union Gas was consequently liable for the cleanup costs. *Id.* at 375. Union Gas claimed that the state had negligently caused or contributed to the discharge of coal tar through their excavation activities, and that they should therefore pay for the cleanup. *Id.*

[7] 42 U.S.C. §§ 9601-9675 (Supp. IV 1986).

[8] *Union Gas*, 109 S. Ct. at 2279. Pennsylvania claimed that CERCLA merely provided that states may be liable to the United States, not to private entities such as Union Gas Company. *Id.*

[9] *Id.* at 2281. Pennsylvania claimed that the principle of sovereign immunity within the eleventh amendment precluded congressional enactment of a statute subjecting a state to liability for money damages. *Id.*

[10] *Id.* at 2277. The United States District Court for the Eastern District of Pennsylvania dismissed the third-party complaint and accepted Pennsylvania's claim that sovereign immunity barred the suit. United States v. Union Gas Co., 575 F. Supp. 949, 953 (E.D. Pa. 1983). A divided United States Court of Appeals for the Third Circuit affirmed and concluded that CERCLA did not contain an unmistakable revocation of the eleventh amendment. United States v. Union Gas Co., 792 F.2d 372, 381-82 (3d Cir. 1986). While petition for certiorari was pending, CERCLA was amended by the passage of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986). SARA's amended definitions section provides:

> The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through . . . circumstances in which the government involuntarily acquired title by virtue of its function as sovereign. The exclusion under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance . . . .

§ 101(b), 100 Stat. 1613, 1615. The plain statement that liability of the state as an "owner or operator" existed if the state caused or contributed to the release of toxic substances proved significant. *Union Gas*, 109 S. Ct. at 2278. A reading of SARA together with CERCLA clearly indicated that Congress intended for state liability to exist along with that of private entities for cleanup costs of contaminated property. *Id.* Because of the passage of SARA, the United States Supreme Court granted certiorari, vacated the ruling of the court of appeals, and remanded for reconsideration in light of

Circuit held that CERCLA permitted suits against states for money damages.[11] The United States Supreme Court granted certiorari and, *held*, affirmed.[12] Where CERCLA's language clearly evidences congressional intent to hold states liable for money damages in federal court, then Congress can justifiably revoke state sovereign immunity and hold states liable for environmental response costs under CERCLA. *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2277, 2286 (1989).

While the doctrine of sovereign immunity originated in the English common law and the feudal system,[13] academics have questioned whether sovereign immunity ever existed in actual practice in England.[14] In fact, eighteenth century American colonists refused to accept the doctrine of governmental immunity,[15] and the Constitution's fram-

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SARA. United States v. Union Gas Co., 479 U.S. 1025, 1025 (1987). The court of appeals reversed and remanded, holding that the statute's amended language rendered states liable for monetary damages and that Congress had such authority under the commerce clause. *Id.* at 2274.

[11] United States v. Union Gas Co., 832 F.2d 1343, 1345 (3d Cir. 1986). The court of appeals reversed and remanded, holding that CERCLA renders states liable for money damages in federal court and that Congress can likewise render states liable when it legislates pursuant to the commerce clause. *Id.* at 1357.

[12] *Union Gas*, 109 S. Ct. at 2277, 2281. The effect of the decision is that Congress may override a state's sovereign immunity, but it must make its intent to do so unmistakably clear. *Id.* at 2277. According to the Court's reasoning, CERCLA clearly expresses congressional intent to hold states liable for damages for conduct described in the statute. *Id.* Because CERCLA expressed an intent to hold states liable, the Court next considered the question of whether the commerce clause granted Congress the power to abrogate a state's sovereign immunity. *Id.* at 2281. Congress may permit damage suits against states, since the states surrendered part of their sovereignty when they granted Congress the authority to regulate commerce. *Id.*

[13] Mathis, *The Eleventh Amendment, Adoption and Interpretation*, 20 GA. L. REV. 207, 208 (1968). The courts of England belonged to the king as head of the federal system, and the king could not be sued in his own court. *Id.*

[14] *Id.* at 209. English subjects could bring suits against the king with his consent, which was regularly granted as a matter of course. *Id.* By the 17th century, the petition of right allowed suits against the monarch, governmental officials, and corporate bodies. Borchard, *Government Liability in Torts*, 34 YALE L.J. 1, 7, 16, 22-24 (1924); *see* Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 9-16 (1977) (arguing that sovereign immunity never truly existed in England).

[15] Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1897 (1983). The first charter of Massachusetts, the 1620 Charter of New England, established the colonies' first political and corporate body with "full power and lawful authority . . . to sue and be sued; to implead, and to be impleaded; answer, and to be answered, unto all manner of Courts . . . ." *Id.* Connecticut's Charter of 1662 and Rhode Island's Charter of 1663 both contained almost identical provisions. *Id.*

ers apparently rejected the idea as well.[16]

The doctrine of sovereign immunity survived, nevertheless, and the chronicle began anew with *Chisholm v. Georgia*.[17] In *Chisholm*, the Supreme Court articulated the principle that sovereign immunity was contrary to the Constitution, for sovereignty rested with the people, not the government.[18] Fearful of the ramifications of the *Chisholm* decision, however, a wide majority of both houses of Congress passed a resolution proposing the eleventh amendment, which was subsequently ratified by the states.[19]

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[16] Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines*: (pt. I), 126 U. PA. L. REV. 515, 527 (1978). Article III of the United States Constitution conferred jurisdiction upon the federal judiciary and thus invalidated the doctrine of sovereign immunity. *Id.* at 530. Article III states: "The judicial Power shall extend to . . . Controversies . . . between a State and Citizens of another State . . . and between a State, or the citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2, cl. 1. By placing disputes between states and citizens within federal jurisdiction, the article affirmatively abrogated state sovereign immunity. Field, *supra*, at 530.

[17] 2 U.S. (2 Dall.) 419 (1793). An executor of a South Carolina estate sued Georgia to recover damages for supplies provided to the state during the Revolutionary War. *Id.* at 419.

[18] *Chisholm*, 2 U.S. (2 Dall.) at 457 (Wilson, J.); *see* Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 220 (1968). The Supreme Court allowed federal jurisdiction over the South Carolina citizen's claim despite Georgia's protest of sovereign immunity. *Chisholm*, 2 U.S. (2 Dall.) at 425. The Court ruled that federal courts maintained jurisdiction over individual claims against states based upon article III, which granted jurisdiction over "controversies between a state and citizens of another state." *Id.* at 450. Furthermore, the Court held that state immunity to federal jurisdiction invalidated constitutional clauses that regulated the states, such as the contracts clause. *Id.* at 465 (Wilson, J.). Justice Wilson's fears came true 100 years later when the Supreme Court ruled that the eleventh amendment became an implied term to every state contract and that the eleventh amendment therefore prohibited a person from enforcing a contract with a state. *See In re* Ayers, 123 U.S. 443, 505-06 (1887) (equity suits to enforce contracts against state officers were not within states' judicial power).

[19] Gibbons, *supra* note 15, at 1933-34. The amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST., amend. XI. The reaction to *Chisholm* marked one of only four times in our history that a constitutional amendment has overruled a Supreme Court decision. Gibbons, *supra* note 15, at 1895. Oregon v. Mitchell, 400 U.S. 112, 118 (1970), holding unconstitutional the Voting Rights Act of 1970, which lowered the voting age for state and local elections, was overruled by the twenty-sixth amendment; Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 443 (1895) which held the federal income tax unconstitutional, was overruled by the sixteenth amendment; Scott v. Sandford, 60 U.S. (19 How.) 393, 395 (1857), which held the slavery prohibition in the Northwest Territory Ordinance unconstitutional, was overruled by the thirteenth amendment. Gibbons, *supra* note 15, at 1895. At the time of its

The Supreme Court decision of *Cohens v. Virginia*[20] first addressed the latitude of the eleventh amendment.[21] Chief Justice Marshall rejected the reasoning that the eleventh amendment and sovereign immunity prohibited a state from appearing before the Supreme Court.[22] In addition, the Court held that the eleventh amendment allowed a citizen to sue his own state in federal court.[23]

During the decades following *Cohens*, the Supreme Court evinced a limited recognition of the principle of the eleventh amendment.[24] Although the 1880's witnessed a reduction in states' rights,[25] the Court nevertheless greatly expanded the doctrine of sovereign immunity.[26] In

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ratification, the eleventh amendment merely altered article III of the Constitution by eliminating federal jurisdiction against the states based on diversity. *Id.* at 1894. A consideration of the impact of the foreign affairs crisis at the time and the Federalist concern about enforcing the peace treaty makes it clear that the amendment was not intended to remove from federal jurisdiction suits against states based on federal questions. *Id.* The *Marbury* decision evidenced the Supreme Court's narrow interpretation of the eleventh amendment and state sovereign immunity. Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 164-66, 170-71 (1803). Chief Justice Marshall rejected the contention that government officials enjoyed a British-style sovereign immunity. *Id.* at 170-71. To protect the citizens' rights, Marshall stressed the necessity of judicial relief against executive officers. *Id.* at 164-66. *Marbury*'s logic was as follows: If the only adequate remedy for an ultra vires government action was to override state sovereign immunity, then such a result must follow. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1489 (1987).

[20] 19 U.S. (6 Wheat.) 264 (1821).

[21] *Cohens*, 19 U.S. at 405-12. In *Cohens* the defendants sold District of Columbia lottery tickets in Virginia and were prosecuted for violating the state's gambling laws. *Id.* at 265-66. A significant issue raised on appeal was whether the eleventh amendment barred the Supreme Court from review of a case between a state and citizens of another state. *Id.* at 347-48.

[22] *Id.* at 406. Chief Justice Marshall wrote, "The jurisdiction of the Court still extends to these cases, and in these a State may still be sued." *Id.*

[23] *Id.* at 412. Courts frequently cited *Cohens* because Marshall believed that the eleventh amendment did not restrict federal jurisdiction over federal question claims against the states. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 16 (1988).

[24] Jackson, *supra* note 23, at 9. The Supreme Court allowed a private action to exist against a state officer even if it could not be maintained against a state because of eleventh amendment immunity. *Id.*

[25] *See Ex parte* Virginia, 100 U.S. 339 (1880). *Ex parte Virginia* concerned the arrest of a state judge under a federal statute based on the fourteenth amendment. *Id.* at 340. The Supreme Court ruled that Congress could validly enforce the fourteenth amendment against state action and that such enforcement did not abridge state sovereignty. *Id.* at 346. The Court noted that every additional power granted to the federal government involved a corresponding diminution of state power. *Id.*

[26] Jackson, *supra* note 23, at 9. During the 1880's, Southern states increasingly repudiated their accumulated bond debt incurred as a result of attempted industrialization

1890, the United States Supreme Court in *Hans v. Louisiana*[27] drastically altered its interpretation of the eleventh amendment to limit article III judicial power over the states.[28] Louisiana objected to federal jurisdiction on the ground of state sovereign immunity and claimed that an individual could not sue the state without its consent.[29] The Supreme Court ruled that the eleventh amendment constitutionalized a preexisting understanding of sovereign immunity and held that the amendment rendered a state immune from suit by a citizen of that state, even under federal question jurisdiction.[30] The Court provided little foundation for its rationale in the *Hans* decision and stated, "It is not necessary that we enter upon an examination of the reason or expediency of the rule . . . . It is enough for us to declare its existence."[31]

Following the *Hans* decision, the United States Supreme Court ex-

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after the destruction of the War. *Id.* The Court began to find that suits brought against state officers by out-of-state bondholders were actually "against the state" and thus barred by the eleventh amendment. *Id.* In today's terms, if the older industrial states of the Northeast repudiated their bond debts just as the Southern states did in the 1880's, the federal courts could not hear suits by bondholders against the states. Gibbons, *supra* note 15, at 2004; *see In re* Ayers, 123 U.S. 443, 505-06 (1887) (holding that eleventh amendment sovereign immunity was implied term of every state contract).

[27] 134 U.S. 1 (1890). *Hans* concerned a Louisiana citizen's federal question suit against the State of Louisiana, which arose from the state's repudiation of its bond obligations. *Hans*, 134 U.S. at 2.

[28] Jackson, *supra* note 23, at 9. Some scholars have argued that the *Hans* decision represents one of the boldest examples of judicial activism ever. Gibbons, *supra* note 15, at 1893. The boldness of this decision has been viewed as resulting from the peculiar and temporary circumstances facing the court, which led it to rewrite the eleventh amendment and give it a meaning its framers never intended to have. *See id.*

[29] *Hans*, 134 U.S. at 3.

[30] *Id.* at 14-15. Writing for the majority, Justice Bradley stated that *Chisholm* contradicted the understanding of state immunity and that article III did not abrogate state sovereign immunity. *Id.* at 19. Justice Bradley also argued that in the previous case of *Cohens*, Chief Justice Marshall had incorrectly concluded that state immunity applied only to those areas expressly outlined in the eleventh amendment. *Id.* at 19-20. The Court in *Hans* went on to state that the retreat from sovereign immunity espoused by Justice Marhsall and the Court in *Chisholm* "created a shock of surprise throughout the country." *Id.* at 10-11. The *Hans* Court ruled that any abrogation of state sovereign immunity contradicted the understanding of state immunity as expressed by the founding fathers in the Virginia ratifying convention. *Id.*; *see also* Brennan v. Stewart, 834 F.2d 1248, 1251 (5th Cir. 1988) (holding that eleventh amendment shielded states from suits by both citizens and noncitizens).

[31] *Hans*, 134 U.S. at 21. Perhaps this language indicates that the Supreme Court couched its ruling in terms of abstract jurisprudence and legal history to avoid discussing the tremendous popular pressure that actually dictated the decision. Gibbons, *supra* note 15, at 2001.

hibited inconsistency in construing the *Hans* ruling and state sovereign immunity.[32] Although state sovereign immunity proved to be a well grounded principle, the Supreme Court evidenced growing dissatisfaction with the doctrine.[33] The Court eventually devloped the basis for the consent theory, which eroded sovereign immunity by providing that states could waive their immunity and consent to suit by private parties.[34]

In the landmark decision of *Parden v. Terminal Railway of Alabama Docks Department*,[35] the Court elaborated upon the consent theory.[36] The Court held that although a state cannot be sued without consent, because Alabama chose to operate an interstate railroad,

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[32] *See Ex parte* Young, 209 U.S. 123, 159-60 (1908) (holding that state officer revoked his official character and became subject to liability if he sought to enforce state act that violated United States Constitution); Pennoyer v. McConnaughty, 140 U.S. 1, 13 (1891) (holding that eleventh amendment was no bar to grant of equitable relief against state officers). However, the Court continually expanded the *Hans* rationale and subsequently held that federal jurisdiction over admiralty matters did not extend to suits against states. *Ex parte* New York, 256 U.S. 490, 497-98 (1921); *see also* Principality of Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934) (extending principle of state sovereign immunity by ruling that foreign states could not sue state in federal court).

[33] Justice Frankfurter's dissent in Great N. Life Ins. v. Read, 322 U.S. 47 (1944) attested to the ongoing dissatisfaction with the doctrine. *Great Northern Life*, 322 U.S. at 59 (Frankfurter, J., dissenting). In that case Oklahoma consented to suit for alleged illegal taxes in state court only. *Id.* at 54. The Supreme Court sustained a state's right to waive immunity in state courts, while it maintained immunity in federal courts for the same cause of action. *Id.* at 55. In his dissent, Frankfurter argued that sovereign immunity runs counter to modern democratic notions of state moral responsibility. *Id.* at 59. This privilege represented an attribute of monarchial immunity, Frankurter protested. *Id.* "[I]t is a wholesome sight to see 'the Crown' sued and answering for its torts." *Id.* (quoting 3 MAITLAND, COLLECTED PAPERS 263 (1911)); *see also* Kennecott Copper Corp. v. State Tax Comm'n, 372 U.S. 573 (1946) (holding that state suit against Utah treasury represented valid state court action but was invalid federal action because of eleventh amendment); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945) (holding that suit against Indiana treasury was valid in state court but federal court lacked authority because of eleventh amendment immunity).

[34] Thornton, *The Eleventh Amendment: An Endangered Species*, 55 IND. L. REV. 293, 317 (1980). In 1959, the Court held that if a state accepted an interstate compact from the federal government in which Congress consented to suit, then the accepting state also consented to suit. Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 280 (1959). The Supreme Court held that the interstate compact became approved "under conditions that make it clear that states accepting it waived any immunity from suit which they otherwise might have." *Id.* Thus the consent theory was born.

[35] 377 U.S. 184 (1964).

[36] *Parden*, 377 U.S. at 192-94. Terminal Railway was wholly owned and operated by Alabama for profit and was involved in interstate commerce. *Id.* at 185. An injured railway employee sued the State of Alabama in federal court pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (1982). *Parden*, 377 U.S. at 184.

under the commerce clause the state "necessarily consented" or constructively consented to suit when a railway employee was injured while in the course of his employment.[37] The *Parden* Court ruled that since the states empowered Congress with the authority to regulate commerce,[38] then the states surrendered all sovereignty that might stand in the way of such regulation.[39]

In *Employees of the Department of Public Health & Welfare v. Missouri Department of Public Health & Welfare*,[40] the Supreme Court considered liability of the state as employer under the Fair La-

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[37] *Parden*, 377 U.S. at 195 n.13. Under FELA, state liability existed in federal court for injuries suffered by an employee of a state-owned railroad. *Id.* at 192. The *Parden* majority posed two questions when determining whether state liability to an individual survived in federal court: first, whether Congress intended the state to subject the states to liability; and second, whether Congress possessed the authority to abrogate state immunity pursuant to the commerce clause. *Id.* In resolving the first question, the Court analyzed the statute's language and determined that Congress intended to revoke state immunity. *Id.* Then the Supreme Court held that the United States Constitution granted Congress the power to abrogate state sovereign immunity when enacting legislation pursuant to the Constitution. *Id.* at 188, 191.

[38] U.S. CONST. art. I, § 8, cl. 3. "The Congress shall have power to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." *Id.*

[39] *Parden*, 377 U.S. at 192. The states surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce. *Id.* at 191; *see also* Mauldin v. Molpus, 647 F. Supp. 891, 893 (S.D. Miss. 1986) (holding unconsenting state immune from federal suit brought by state's own citizen). *Contra* Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping Auth., 682 F. Supp. 1345, 1352 (E.D. La. 1988) (holding Congress had not abrogated eleventh amendment sovereign immunity pursuant to commerce clause). The *Parden* Court cited leading commerce clause decisions to illustrate the depth of congressional commerce power. "This power, like all others vested in Congress, is complete in itself, may be exercised to the utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution . . . the sovereignty of Congress . . . is plenary to those objects." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1196-97 (1824); *see also* Wickard v. Filburn, 317 U.S. 111, 127-28 (1942) (holding power to regulate commerce included power to regulate commodity prices).

Some scholars opposed the *Parden* decision, however, because it represented a departure from the jurisdictional nature of the eleventh amendment as evidenced by a state's right to waive its eleventh amendment defense. Thornton, *supra* note 34, at 303. The *Parden* ruling contradicted the well-established principle that a person cannot confer federal jurisdiction by mutual agreement, waiver, or estoppel. *Id.*; *see* Sosna v. Iowa, 419 U.S. 393, 398 (1975) (holding that litigants could not invoke federal jurisdiction over litigation which did not involve "case or controversy"). The *Parden* decision represented another effort by the Supreme Court to avoid the eleventh amendment in federal question cases. Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 HOUS. L. REV. 1, 30 (1967).

[40] 411 U.S. 279 (1973).

bor Standards Act.[41] Although the Court recognized that Congress had intended to hold the states liable, it held that the State of Missouri could not be sued in federal courts because such abrogation of the state's immunity was not advocated in the language of the statute.[42]

The court further increased state immunity by introducing a more limited view of the consent (waiver) theory in *Edelman v. Jordan*.[43] This case concerned a class action suit against the State of Illinois for equal protection violations.[44] Although the lower court implemented the concept of constructive waiver,[45] the Supreme Court held that fed-

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[41] *Employees*, 411 U.S. at 281 (citing Fair Labor Standards Act of 1938, 52 Stat. 1069, codified as amended at 29 U.S.C. § 216(b) (1988)).

[42] *Id.* at 285. In its analysis, the Court declined to extend the commerce power of Congress because it found no legislative intent in the FSLA to give such force to the supremacy clause. *Id.* at 286-87. The Court in the instant case interpreted the Supreme Court's ruling in *Employees* to mean that the power to regulate commerce included the power to override state immunity from suit, but that Congress would not be deemed to have overridden this immunity unless it did so clearly. *Union Gas*, 109 S. Ct. at 2281; *see also* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 475-76 (1987) (holding that states consent to suit with respect to commerce clause only if congressional intent is unmistakably clear); County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 252 (1985) (holding that since commerce clause expressly authorized Congress to regulate commerce with Indian tribes, states necessarily consented to suit under statutes pursuant to this clause); Pacheco v. Soler Aquino, 833 F.2d 393, 401 (1st Cir. 1987) (holding state immune from federal suit by its own citizens or citizens of another state only if it gave no consent).

In *Employees* Justice Brennan openly disagreed with the entire concept of sovereign immunity. *Employees*, 411 U.S. at 323 (Brennan, J., dissenting). Brennan argued that in a nation whose ultimate sovereignty existed with the people and not the government, a doctrine based on kingship proved indefensible. *Id.* The dissent further stated that a state's sovereignty should not exist to the detriment of its citizens. *Id.*

[43] 415 U.S. 651 (1974).

[44] *Edelman*, 415 U.S. at 653. Here citizens brought a class action suit against the State of Illinois and contended that the state violated federal law and equal protection in administering federal-state aid programs. *Id.*

[45] *Id.* at 671, 673. The Court reasoned that if the state did not consent to suit, the eleventh amendment prohibited private party suits against the state if any judgment would be payable from public funds. *Id.* at 663. The *Edelman* decision broadened state immunity, for it barred private party suits against state officials which must be paid from public funds. *Id.* The Supreme Court further held that the eleventh amendment permitted prospective relief, such as an injunction, against a state to regulate future behavior. *Id.* at 664. However, retrospective relief for past wrongdoings must be invalid because it could only be provided by payment from the state treasury. *Id.* at 665; *see also* Savidge v. Finncannon, 836 F.2d 898, 903 (5th Cir. 1988) (holding eleventh amendment barred suits against states for money damages). Previous cases, such as *Parden*, established the concept of constructive waiver, whereby Congress could waive state immunity if the state had participated in a field subject to federal regulation. *Edelman*, 415 U.S. at 672-73; *see supra* notes 35-39 and accompanying text.

eral waiver of state sovereign immunity existed only "where stated 'by the most *express language* or by such *overwhelming implications* from text as will leave no room for any other reasonable construction.' "[46] The constructive consent theory first espoused by *Parden* was consequently restricted by *Edelman*'s "express language" provision.[47]

In 1976, the Supreme Court in *Fitzpatrick v. Bitzer*[48] again addressed the issue of whether Congress could subject states to damage suits in federal court when it legislated under the authority of constitutionally granted powers.[49] In *Fitzpatrick*, the Supreme Court held that pursuant to the fourteenth amendment, Congress could authorize the revocation of eleventh amendment state immunity for suits in federal court.[50] In *Parden*, the commerce clause provided the basis for abrogating state immunity,[51] while in *Fitzpatrick*, the fourteenth amendment provided the basis for evoking sovereign immunity.[52] Nevertheless, the Court held that a state surrendered its sovereign immunity when Congress enacted provisions obedient to the enumerated powers of the commerce clause of the fourteenth amendment.[53]

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[46] *Id.* at 673 (citing Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)) (emphasis added). Section 9620(a)(1) of CERCLA met this "unequivocal expression" standard established by *Edelman*, because Congress expressly waived a state's sovereign immunity against suit for environmental cleanup costs. United States v. Testan, 424 U.S. 392, 399 (1976).

[47] *See Edelman*, 415 U.S. at 673. Justice Rehnquist added, "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here." *Id.*

[48] 427 U.S. 445, 448 (1976).

[49] *Fitzpatrick*, 427 U.S. at 448. The *Fitzpatrick* case concerned a Connecticut state employees' class action suit brought against the state in federal court. *Id.*

[50] *Id.* at 451. In its rationale, the Court recognized the shift in the federal/state balance that resulted from the Civil War Amendments. *Id.* at 455.

[51] *Parden*, 377 U.S. at 191.

[52] *Fitzpatrick*, 427 U.S. at 451. The Court in *Fitzpatrick* provided a foundation for the argument that congressional power to regulate commerce included the authority to override state sovereign immunity. *Id.* at 452.

[53] *Id.* A state might not assert the ancient and unconstitutional doctrine of sovereign immunity when it violated the Constitution. *Id.* at 457-58 (Brennan, J., concurring). The states surrendered that immunity, at least insofar as they granted Congress authority to enact provisions under the specifically enumerated powers of the commerce clause and the fourteenth amendment. *Id.*; *see also* Oregon v. Mitchell, 400 U.S. 112, 131-34 (1970) (because state literacy test was unconstitutional, state was subject to suit in federal court); Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (states surrendered immunity from suit pursuant to fourteenth amendment). *Contra* Equal Employment Opportunity Comm'n v. Wyoming, 460 U.S. 226, 259 (1983) (Burger, J., dissenting) (insufficiency of commerce clause to give federal government "blank check" to intrude into state government affairs).

Decisions of the early 1980's have confirmed that the Supreme Court has espoused a limited and literal interpretation of the eleventh amendment.[54] In *Atascadero State Hospital v. Scanlon*,[55] the respondent alleged that California State Hospital denied him employment because of a physical handicap.[56] The Court reiterated language from earlier rulings and held that before state sovereign immunity could be abrogated, congressional intent as stated in the act must be "unmistak-

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Congressional authority to enact provisions that addressed hazardous waste was established in 1982 when the Court held that the problem of environmental harm proved not susceptible to a local solution. Illinois v. Milwaukee, 406 U.S. 91, 107 (1972). The Supreme Court invalidated one state's attempt to deal with environmental issues at a local level and indicated that an environmental law applicable to all states would survive under the commerce clause. Philadelphia v. New Jersey, 437 U.S. 617, 621-22 (1978). As a further indication of congressional intent in CERCLA, the United States Court of Appeals for the Sixth Circuit stated that Congress sought to assist the federal government by allowing private parties who voluntarily cleaned up hazardous waste sites to recover a proportionate amount of the cleanup costs from other potentially liable parties. Walls v. Waste Resource Corp., 761 F.2d 311, 317-18 (6th Cir. 1986). It should be noted that states are included within CERCLA's definition of potentially liable parties. *See infra* note 65.

[54] *See* Cory v. White, 457 U.S. 85, 91 (1982) (attempted interpleader action against state official was barred by eleventh amendment); *cf.* Florida Dep't. of State v. Treasure Salvors, 458 U.S. 670, 671 (1982) (eleventh amendment was no bar to action in admiralty against state officers). Though the rulings appear contradictory, their consistency lies in a literal interpretation of the eleventh amendment. Gibbons, *supra* note 15, at 1892. Both rulings expressly followed the provisions of the eleventh amendment. *Id.* In *Cory*, the Court denied federal jurisdiction because diversity provided its basis, while in *Florida Dep't of State*, the Court allowed federal jurisdiction because federal question provided its basis. *Id.* However, in 1984, the Court held that sovereign immunity precluded monetary relief for past harms when the relief would not be paid by the state officer as wrongdoer, but by the state treasurer. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 106 (1984). Justice Powell wrote for the plurality that the true significance of the eleventh amendment "lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority." *Id.* at 98. The lack of consistency in the sovereign immunity cases resulted from the differing philosophies of those who espoused a decentralized view of federal-state relations, such as Justices Rehnquist and O'Connor, and those who espoused a centralized view, such as Justices Brennan and Stevens. Lee, *Sovereign Immunity and the Eleventh Amendment: The Uses of History*, 18 URB. 519, 547 (1986). Those who adhered to a decentralized view believed that sovereign states were fundamental to the constitutional balance and that autonomy was an integral part of state sovereignty. *Id.* The dissenters protested that the decentralized view of the eleventh amendment violated two fundamental principles: "First, national goals enunciated by Congress should prevail over state interests; and second, full range of judicial remedies should be available to hold states accountable to rules of law." *Id.* at 548.

[55] 473 U.S. 234 (1985).

[56] *Atascadero*, 473 U.S. at 236.

ably clear."[57]

More recent decisions continue to reiterate this "unmistakably clear" standard.[58] In *Welch v. Texas Department of Highways & Public Transportation*,[59] the Court required an "unequivocal expression" of congressional intent to override eleventh amendment immunity.[60] The *Welch* Court found such intent in the Jones Act; accordingly, the plenary power to regulate commerce could be used by Congress to recover money damages in federal court.[61]

In the instant case, the Court reasoned that since the plain language of CERCLA expressly included states within the statute's definition of "persons"[62] and the language of the SARA amendment clearly permitted states to be "owners or operators" in all but very few circumstances,[63] these expressed conditions represent an "unequivocal expression" of Congressional intent for states to be liable as private individuals for cleanup costs recoverable under CERCLA.[64] More specifically, the Court stated that state liability under CERCLA exists

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[57] *Id.* at 243. In addition, the Supreme Court held that inference from legislative history would not suffice to express unmistakable language of congressional intent to abrogate state immunity. *Id.* In this decision, Justice Brennan proffered the diversity theory of the scope of the eleventh amendment and suggested that the amendment barred federal jurisdiction over state suits only when the sole basis of jurisdiction was diversity. Marshall, *Fighting Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1342 (1989). If the eleventh amendment guaranteed total state immunity, he reasoned, it would transform constitutional guarantees into rights unenforceable in federal court. *Id.* at 1352. The issue posed to the United States Supreme Court is clear: Were states *immune* for the consequences of their actions or were states *accountable* for the consequences of the actions? *Id.* (emphasis added).

[58] *See* Green v. Mansour, 474 U.S. 64, 68 (1985). The Supreme Court again declared that states may not be sued in federal court unless Congress, pursuant to a valid exercise of power, has unequivocally expressed its intent to revoke immunity. *Id.*

[59] 483 U.S. 468 (1987).

[60] *Welch*, 483 U.S., at 471-71 (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985). The United States Supreme Court held that a federal statute could not override state immunity unless it did so in unmistakably clear language. *Id.*

[61] *See* Dellmuth v. Muth, 109 S. Ct. 2397, 2401 (1989) (legislative history was irrelevant; congressional intent could be proven only by unequivocal textual evidence).

[62] 42 U.S.C. § 9601(21) (Supp. IV 1986).

[63] 42 U.S.C. § 9601(20) (D) (Supp. IV 1986) (original version at 100 Stat. 1613).

[64] Pennsylvania v. Union Gas, 109 S. Ct. 2273, 2277 (1989). CERCLA described those who might be liable as "persons" and "owners or operators." *Id.* In 42 U.S.C. § 9601(21) (Supp. IV 1986), states were included within the CERCLA definition of persons, and in 42 U.S.C. § 9601(20)(A) (Supp. IV 1986), "owners or operators" were defined by reference to certain activities a "person" might undertake. *Union Gas*, 109 S. Ct. at 2277. Within 42 U.S.C. § 9601(20)(D) (Supp. IV 1986), CERCLA excludes a state from the category of "owner or operator" only if it acquired ownership or control involuntarily by virtue of its function as sovereign. *Union Gas*, 109 S. Ct. at 2278.

to the same extent as that of any nongovernmental entity; therefore, it would be wrong to interpret this statute to mean that only the United States, rather than a private citizen, could sue states for damages under CERCLA.[65] In addition, the Supreme Court found that the states surrendered part of their sovereignty in granting Congress the authority to regulate commerce, with the result that Congress' authority to regulate commerce includes the power to override a state's sovereign immunity when it interferes with such regulations.[66] The Supreme Court likewise held that since the problem of environmental pollution proves too broad for a local solution, the commerce clause requires that one must look to the federal government for environmental solutions.[67] Finally, to be effective, according to the Court, those solutions must contain a cause of action for money damages.[68]

The United States Supreme Court's decision in *Pennsylvania v. Union Gas Co.* denoted a continued movement away from the feudal principle of sovereign immunity.[69] Because the Supreme Court recog-

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[65] *Union Gas*, 109 S. Ct. at 2278. In 42 U.S.C. § 9601(20)(D) (Supp. IV 1986), CERCLA provides that the state immunity should not apply to a state which had caused or contributed to the release of hazardous substances and that such a state should be subject to the provisions of the chapter to the same degree as a nongovernmental entity. *Union Gas*, 109 S. Ct. at 2278.

[66] *Union Gas*, 109 S. Ct. at 2281. Citing *Employees*, the Court declared: "The power to regulate commerce includes the power to override States' immunity from suit, but we will not conclude that Congress has overridden this immunity unless it does so clearly." *Id.* (quoting Employees of the Dep't of Pub. Health & Welfare v. Missouri Dep't of Pub. Health & Welfare, 411 U.S. 279 (1973)). However, in an opinion which partly concurred and partly dissented, Justice Scalia, joined by Justices Rehnquist, O'Connor, and Kennedy, reasoned that the eleventh amendment embodied the broad constitutional principle of sovereign immunity and that the judicial power of the United States did not extend to private suits against a state unless the state consciously consented to be sued. *Id.* at 2300 (Scalia, Rehnquist, O'Connor, Kennedy, JJ., concurring in part and dissenting in part).

[67] *Id.* at 2284. Constitutionally, a state could not prohibit the treatment and disposal of waste generated outside the state, but it proved impractical for a state to forbid the disposal of all waste. *Id.*; *see* Philadelphia v. New Jersey, 437 U.S. 617, 629 (1977) (New Jersey law banning importation of waste constituted protectionist measure in violation of commerce clause). A law applicable to all waste would have survived only under the commerce clause. *Id.*

[68] *Union Gas*, 109 S. Ct. at 2285. Prior environmental statutes had generally failed because they focused on preventive measures to the exclusion of remedial ones. *Id.* Because the federal government's resources were finite, Congress intended that CERCLA's remedy be sweeping. *Id.* In 42 U.S.C. § 9613(f)(1) (Supp. IV 1986), Congress provided that everyone who was *potentially* responsible for hazardous waste pollution could be forced to contribute to the cleanup costs. *Union Gas*, 109 S. Ct. at 2285 (emphasis added).

[69] *See supra* note 13.

nized congressional authority to abrogate state immunity when legislating pursuant to the plenary power of the Constitution,[70] this decision brought the United States one step closer to reposing ultimate sovereignty in the people and not the government.[71] Subsequent Supreme Court decisions have relied upon the holding in *Pennsylvania v. Union Gas Co.* and thus provided early evidence of the validity of the Court's ruling.[72]

In addition, this decision allowed our country to address a problem that is now a national crisis, the cleaning up of hazardous waste sites. Because of the national character of environmental pollution, the problem is often not susceptible to a local solution.[73] The commerce clause ensures that the federal government has the authority to formulate environmental solutions.[74] As the *Union Gas* opinion accurately observes, however, an environmental solution is effective only if it contains a cause of action for money damages.[75] The present CERCLA cause of action came about only after the failure of earlier congressional attempts to solve the growing crisis posed by hazardous waste.[76] Prior statutes, such as the Resource Conservation and Recovery Act of 1976,[77] were ineffective because they focused on preventive measures to the exclusion of remedial measures.[78] Today the situation is critical, for our country houses thousands of hazardous waste sites, with the number growing daily.[79] Hence, the CERCLA remedy is sweeping: everyone who is potentially responsible for hazardous-waste contamination may be liable for the cleanup costs.[80] Congress realized that the federal government could not pay up front the enormous cleanup costs of many polluted areas.[81] Congress therefore provided that the federal govern-

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[70] *See supra* notes 12 and 39.

[71] *See supra* notes 42 and 54.

[72] *Id.*; *see* Hoffman v. Connecticut Dep't of Income Maintenance, 109 S. Ct. 2818, 2382 (1989) (Congress had authority under commerce clause to abrogate state's eleventh amendment immunity); Missouri v. Jenkins, 109 S. Ct. 2463, 2464 (1989) (Congress could abrogate eleventh amendment immunity in unmistakably clear language within statute itself); Will v. Michigan Dep't of State Police, 109 S. Ct. 2304, 2306 (1989) (unlike municipalities, states are not considered "persons" under 42 U.S.C. § 1983).

[73] *See supra* note 68 and accompanying text.

[74] *See supra* note 68 and accompanying text.

[75] *See supra* notes 68, 69 and accompanying text.

[76] *See supra* note 69.

[77] 42 U.S.C. § 6901 (1986).

[78] *See supra* note 69 and accompanying text.

[79] *See supra* note 69.

[80] *See supra* notes 53 and 69.

[81] *See supra* note 69 and accompanying text.

ment may recoup the costs of its own cleanup. In addition, private parties who voluntarily clean up hazardous-waste sites may recover a proportionate amount of the cleanup costs from other responsible parties.[82] States represent a significant percentage of owners and operators of hazardous waste sites.[83]

If a state were not liable for cleanup costs, the overall effect of CERCLA and the voluntary cleanup plan would be undermined.[84] Many areas of our country could simply remain contaminated because the federal government cannot shoulder the entire burden of cleaning up our nation's polluted areas. Prior to the Court's ruling in *Pennsylvania v. Union Gas Co.*, a private entity could not hold a state liable for damages for past misconduct, because the eleventh amendment barred such a suit.[85] This unjust situation existed because of the *Hans* decision, which rewrote the eleventh amendment and gave it a meaning its framers never intended it to have.[86] After *Pennsylvania v. Union Gas Co.*, the court has applied the correct interpretation of the eleventh amendment. Perhaps effective cleanup efforts by responsible entities will result, and a national environmental disaster can be averted.

Scott Leary

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[82] *See supra* note 69 and accompanying text.
[83] *See supra* note 68.
[84] *See supra* notes 68 and 69.
[85] *See supra* notes 54-62 and accompanying text.
[86] *See supra* notes 27-31 and accompanying text.

1989 MISSISSIPPI SUPREME COURT REVIEW

ADMINISTRATIVE LAW

The year 1989 was a busy year for the Mississippi Supreme Court in the field of administrative law. The court resolved several cases which do not receive textual treatment in this administrative law review. These cases involve issues in the area of workers' compensation,[1] unemployment benefits,[2] professional misconduct,[3] judicial removal,[4]

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[1] Miller Transporters, Inc. v. Guthrie, 554 So. 2d 917, 920 (Miss. 1989) (preexisting disease or injury does not disqualify claim for workers' compensation benefits where employment aggravates, accelerates or combines with injury to produce compensable disability); Bullock v. Roadway Express, Inc., 548 So. 2d 1306, 1308 (Miss. 1989) (Workers' Compensation Commission lacks subject matter jurisdiction to hear petition for declaratory judgment where third party does not seek to intervene or is not subrogated to rights of employer or insurer for benefits paid to employee); Morris v. Landsdell's Frame Co., 547 So. 2d 782, 785 (Miss. 1989) (appellate review cannot disturb Workers' Compensation Commission's findings of facts supported by substantial evidence which is not contradicted by testimony and is not inherently improbable, incredible or unreasonable).

[2] Sunbelt Ford-Mercury, Inc. v. Mississippi Employment Sec. Comm'n, 552 So. 2d 117, 120 (Miss. 1989) (employee who is offered suitable work and refuses to accept such work unless certain restrictions or conditions not usual or customary in employment are met amounts to voluntary termination, thus rendering employee ineligible for unemployment compensation benefits); Shannon Eng'g & Constr., Inc. v. Mississippi Employment Sec. Comm'n, 549 So. 2d 446, 450 (Miss. 1989) (employer bears burden of proof by substantial, clear, and convincing evidence that former employee's conduct warrants disqualification of benefits in unemployment compensation cases); Mississippi Employment Sec. Comm'n v. Pulphus, 538 So. 2d 770, 772 (Miss. 1989) (transportation to and from work is personal problem to be resolved by employee, and one who leaves because of lack of transportation does so without good cause within meaning of Mississippi employment security law).

[3] Haimes v. Mississippi State Bar, 551 So. 2d 910, 913 (Miss. 1989) (attorney's subsequent favorable arbitration of matter which led to his suspension does not require court to reconsider and vacate findings of original disciplinary proceeding); Mississippi State Bar v. An Attorney: L, 551 So. 2d 129, 131-32 (Miss. 1989) (under MISS. RULES OF PROFESSIONAL CONDUCT Rule 7.3, lawyer may not solicit professional employment from prospective client with whom he has no family or close relationship when significant

taxes,[5] administrative action,[6] conditional use permits,[7] and decisions

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motive for doing so is pecuniary gain); Daniels v. Mississippi State Bar, 549 So. 2d 966, 967 (Miss. 1989) (it is within discretion of Mississippi Supreme Court to reinstate attorney suspended from practice of law); Steighner v. Mississippi State Bar, 548 So. 2d 1294, 1299 (Miss. 1989) (attorney's incompetent and negligent handling of client's medical malpractice claim, even though not dishonest or fraudulent, subjects him to discipline, including suspension. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101 and 7-101 (1987)); Barfield v. Mississippi State Bar Ass'n, 547 So. 2d 46, 49-50 (Miss. 1989) (default judgment granted in attorney disciplinary proceeding for dishonest and fraudulent acts where attorney acknowledged receipt of summons and formal complaint but failed to answer or file responsive pleading); Mississippi State Bar v. Gautier, 538 So. 2d 772, 776 (Miss. 1989) (attorney reinstated to practice of law after disbarment for felony conviction for possession of cocaine by proving his rehabilitation from cocaine use through subsequent improvement in conduct and character).

[4] *In re* Quick, 553 So. 2d 522, 527-28 (Miss. 1989) (judge's removal from office appropriate since long-standing practice of failing to comply with statutory procedure regarding reporting of convictions to appropriate department constitutes willful misconduct and conduct prejudicial to administration of justice, which brings judicial office in disrepute); Mississippi Judicial Performance Comm'n v. Coleman, 553 So. 2d 513, 515 (Miss. 1989) (judge's removal from office appropriate since findings of fact showed by clear and convincing evidence that judge had taken monies without authority of law, thus engaging in willful misconduct in office, willful and persistent failure to perform duties of office, and conduct prejudicial to administration of justice); Mississippi Judicial Performance Comm'n v. Thomas, 549 So. 2d 962, 966 (Miss. 1989) (judge pro tempore's felony conviction is, of necessity, conduct violating MISS. CODE OF JUDICIAL CONDUCT Canons 1, 2A, 2B, 3A (1989), prohibiting conduct prejudicial to administration of justice which brings judicial office into disrepute and thus justifies removal from office); *In re* Hearn, 542 So. 2d 901, 902-03 (Miss. 1989) (removal from office is only appropriate sanction where justice court judge, who had previously been disciplined for "ticket fixing" and using influence to seek favorable consideration, continues course of judicial misconduct); *In re* Bailey, 541 So. 2d 1036, 1040 (Miss. 1989) (public reprimand proper where justice court judge interfered with another judge's order and had defendant in eviction and past-due rent case jailed).

[5] McGowan v. Marx, 546 So. 2d 699, 700 (Miss. 1989) (court's affirmance of assessment by Mississippi Sales Tax Commission does not constitute judgement or decree for sum of money so as to invoke statutory penalty provided for in MISS. CODE ANN. § 11-3-23 (Supp. 1989)).

[6] Melody Manner Convalescent Center v. Mississippi State Dep't of Health, 546 So. 2d 972, 974 (Miss. 1989) (only grounds for court to overturn action of Mississippi Health Care Commission in granting certificate to expand extended health care facility is where agency has acted capriciously, unreasonably, arbitrarily, abused its discretion, or violated vested constitutional right of party).

[7] Barnes v. Board of Supervisors, 553 So. 2d 508 (Miss. 1989) (granting of conditional use permit by county board of supervisors, which imposes conditions and restrictions upon granting of such permit to relocate gravel wash plant and open new gravel mining operation, is tantamount to finding of fact by such granting authority and binding upon appellate court).

of the Mississippi Public Service Commission.[8]

Decisions of the Mississippi Supreme Court receiving textual explanation in this review embraced such important issues of law as the liability of an employer for an employee's injury which was partially caused by the employee's taking medication sold by the employer;[9] the nonapportionment of workers' compensation benefits between two separate, unrelated work-connected injuries sustained by an employee,[10] the requirement that the Mississippi Public Service Commission must act within the statutory power expressly granted to it when adopting a plan of a public utility which equates to a rate increase,[11] the ruling that administrative agency proceedings are governed under the Mississippi Administrative Procedures Law and are not within the purview of the Mississippi Rules of Civil Procedure,[12] and finally, that a company, when computing its franchise tax base, cannot include a liability account as a definite known fixed liability where the funds that allegedly constitute the liability continue to be available for company use.[13]

I. Workers' Compensation

The Mississippi Supreme Court rendered two important decisions in the area of workers' compensation. The first case expanded the scope of injuries which arise out of and in the course of employment, while the second case addressed the apportionment of benefits recoverable by an employee who suffered two unrelated work-connected injuries. In *Quitman Knitting Mill v. Smith*,[14] the Mississippi Supreme Court addressed the issue of whether tremors suffered by an employee as a result of taking a cold tablet sold to the employee by the employer arises out of and in the course of employment.[15] The employer argued

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[8] State *ex rel.* Pittman v. Mississippi Pub. Serv. Comm'n, 538 So. 2d 387, 394-95 (Miss. 1989) (after public utility had met its burden of proof that proposed rate increase was just and reasonable, Mississippi Public Service Commission acted within its statutory authority to accept or reject any or all of experts' testimony when making decision).

[9] Quitman Knitting Mill v. Smith, 540 So. 2d 623 (Miss. 1989); *see infra* notes 14-20 and accompanying text.

[10] Stuart's, Inc. v. Brown, 543 So. 2d 649 (Miss. 1989); *see infra* notes 21-27 and accompanying text.

[11] State *ex rel.* Pittman v. Mississippi Public Service Comm'n, 538 So. 2d 367 (Miss. 1989); *see infra* notes 28-39 and accompanying text.

[12] State Oil & Gas Bd. v. McGowan, 542 So. 2d 917 (Miss. 1989); *see infra* notes 52-66 and accompanying text.

[13] Gencorp, Inc. v. State Tax Comm'n, 543 So. 2d 657 (Miss. 1989); *see infra* notes 40-51 and accompanying text.

[14] 540 So. 2d 623 (Miss. 1989).

[15] *Smith*, 540 So. 2d at 624. Sherry Smith was employed by Quitman Knitting Mill

that the essential tremors were congenital[16] and that he, the employer, received no benefit from the sale of the cold tablet.[17] The court found that the employer failed to meet its burden of proof to establish a pre-existing condition,[18] holding that the employee's injury, which was brought about by the use of a personal comfort activity,[19] was a reasonable incident of employment and thus arose out of and in the course of employment.[20]

Turning its attention toward the apportionment of workers' compensation benefits, the Mississippi Supreme Court resolved the case of *Stuart's, Inc. v. Brown*.[21] In *Stuart's*, the court was presented with the

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as a seamstress on May 23, 1977, and was given a pre-employment physical by Dr. Walter Gunn, who subsequently determined that she was fit to work. *Id.* Four days later, on May 27, 1977, she arrived at work suffering from a cold. *Id.* Her immediate supervisor, Ms. Dorothy Dykes, advised her that the employer kept and sold "Chex-it" cold tablets. *Id.* Employees had been notified of the availability of the "Chex-it" cold tablets by a company memorandum signed by the Personnel Manager of the Quitman Knitting Mill. *Id.* Approximately 30 minutes after taking the cold tablet, Ms. Smith started trembling and was taken to Wayne General Hospital where she spent the night. *Id.*

[16] *Id.* Ms. Smith was referred to Dr. Curtis Graf, a neurologist in Mobile, Alabama, who treated her from June, 1977, until January, 1978. *Id.* At the hearing, Dr. Graf testified that Ms. Smith's family had a history of similar tremors and that hers was of the permanent type which was inherited and would probably have developed eventually without her taking the cold medication. *Id.* At a later date Ms. Smith sought reemployment with Quitman Knitting Mill but was informed that her employment had been terminated because of her tremors. *Id.* at 626.

[17] *Id.*

[18] *Id.* at 629. The court found that for the purpose of apportioning permanent partial disability benefits, the employer has the burden of proving that a preexisting condition existed and not the employee that the injury did not exist. *Id.*; *see* General Elec. Co. v. McKinnon, 507 So. 2d 363 (Miss. 1987) (stating that MISS. CODE ANN. § 71-3-7 (1972) governs apportionment between injury and preexisting malady) (citing Bennett v. United Parcel Serv., 382 So. 2d 469, 473 (Miss. 1982)).

[19] *Smith*, 540 So. 2d at 626. The court found that the employer received the benefit of decreased absenteeism due to illness where, by memoranda, the employer suggested to its employees that they avail themselves of the cold tablets at the first aid station of employer. *Id.* The court relied on Collums v. Caledonia Mfg. Co., 115 So. 2d 672, 673 (Miss. 1959) and Big "2" Engine Rebuilders v. Freeman, 379 So. 2d 888, 892 (Miss. 1980), for the proposition that injuries arising from personal comfort activities, which are reasonable incidents of employment, are compensable. *Smith*, 540 So. 2d at 626. The *Collums* court stated that "[w]hat is reasonably incidental depends both on the practices permitted in the particular plant . . . and on the customs of the employment environment generally." *Id.* (citing *Collums*, 115 So. 2d at 673).

[20] *Smith*, 540 So. 2d at 629. The court likewise affirmed the order of the Circuit Court of Lauderdale County for payment of medical bills but remanded the case for further proceedings to determine the amount of medical cost incurred by Ms. Smith. *Id.* at 630.

[21] 543 So. 2d 649 (Miss. 1989).

question of whether a contributing preexisting disability, which entitled an employer to apportionment, must be occupationally disabling before such injury can be apportioned with a subsequent work-connected injury.[22] The case of *Stuart's* involved an employee who was injured in two separate unrelated work-connected injuries, suffering first from a temporary, total disability and then from a permanent, total disability.[23] The court found that section 71-3-7[24] of the Mississippi Code, concerning preexisting conditions, must be read in light of section 71-3-3(i)'s definition of "disability"[25] and held that an apportionment of injuries may not be ordered where the evidence established either (a) that the employee experienced successive injuries and following the first injury engaged in full-time employment prior to the second injury, or (b) that the employee suffered from a preexisting condition which did not cause her to experience a pre-injury occupational

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[22] *Stuart's*, 543 So. 2d at 649-51. The first of Nellie Brown's injuries was sustained while working full time for Stuart's, Inc., when she injured her lower back while lifting boxes. *Id.* at 650. Her back injury twice required surgery, but she returned to work, even though she suffered a 15% impairment to the body as a whole, and was able to discharge fully all of her duties as a manager of the retail clothing store. *Id.* at 651. While recovering from surgery, Ms. Brown received temporary total disability as workers' compensation but did not claim or receive any permanent partial disability. *Id.*

[23] *Id.* at 650. On September 24, 1981, Ms. Brown, while attempting to prevent a shoplifting incident, was beaten so severely that she was knocked unconscious. *Id.* Ms. Brown suffered knee and head injuries and a sprained back, and developed a psychiatric injury diagnosed as severe depressive neurosis. *Id.* Brown was unable to return to work after her second injury and filed a motion to controvert with the Mississippi Workers' Compensation Commission. *Id.* At a hearing before the administrative judge, the judge ordered that Ms. Brown was permanently and totally disabled. *Id.* The order was subsequently affirmed by the Commission. *Id.* On appeal to the Circuit Court of Lee County, Stuart's Inc. argued that the benefits awarded Ms. Brown should have been reduced because her pre-injury back trouble and a post-injury car wreck substantially contributed to her permanent disability. *Id.* at 649.

[24] MISS. CODE ANN. § 71-3-7 provides, in pertinent part:

> Where a preexisting physical handicap, disease or lesion is shown by medical findings to be a material contributing factor in the results following injury, the compensation which, but for this paragraph, would be payable shall be reduced by that proportion which such preexisting physical handicap, disease or lesion contributed to the production of the results following the injury.

MISS. CODE ANN. § 71-3-7 (1972).

[25] MISS. CODE ANN. § 71-3-3(i) provides:

> "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment, which incapacity and the extent thereof must be supported by medical findings.

MISS. CODE ANN. § 71-3-3(i) (1972).

disability.[26] In concluding, the court cautioned that although there was no apportionment between the injuries suffered by claimant, its opinion did not address the subject of either occupational disease or heart attack cases.[27]

II. Mississippi Public Service Commission

In 1989, the Mississippi Public Service Commission (MPSC), in *State ex rel. Pittman v. Mississippi Public Service Comm'n*,[28] experienced first hand the wisdom of the Mississippi Supreme Court. In June, 1986, the MSPC conducted a hearing pursuant to an order[29] in

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[26] *Stuart's*, 543 So. 2d at 655. The court stated that not all preexisting conditions generate a duty to apportion the injury and that only those cases which have produced in the claimant a preexisting occupational disability are properly subject to apportionment. *Id.* at 654. The court found that, following her back troubles, Ms. Brown returned to full-time employment with Stuart's and worked without significant interruption until September, 1981. *Id.* In concluding, the court stated that "[i]f the Commission's findings of fact and order are supported by substantial evidence, all appellate courts are bound thereby . . . .[t]his Court will reverse the Commission's order only if it finds that order clearly erroneous and contrary to the overwhelming weight of the evidence." *Id.* at 656 (citing Fought v. Stuart C. Irby Co., 523 So. 2d 314, 317 (Miss. 1988)); *see also* Robinson v. Packard Elec. Div., Gen. Motors Corp., 523 So. 2d 329, 332 (Miss. 1988); Champion Cable Constr. Co. v. Monts, 511 So. 2d 924, 927 (Miss. 1987).

[27] *Stuart's*, 543 So. 2d at 655 n.13; *see* Dunn, Mississippi Workers' Compensation §§ 90-99 (3d ed. 1982 & Supp. 1988) (presenting a fair consideration of the court's struggle to rationalize heart attack cases within the language and scope of the compensation act).

[28] 538 So. 2d 367 (Miss. 1989).

[29] *Pittman*, 538 So. 2d at 368. Shortly before November 5, 1985, the Mississippi Power Company (MPC) filed a notice of intent to increase rates with the Mississippi Public Service Commission (MPSC). *Id.* On November 5, the MPSC issued an order requiring MPC to file a performance evaluation plan (PEP) or to show cause why it could not comply with the order. *Id.* The order, in pertinent part, stated:

> 3. Under the law rates are not conditioned upon the operating efficiencies and performance of the company although such performance directly affects the revenues of the company and therefore the need for additional rates. This Commission has studied and intends to adopt some new method which will allow it to consider and monitor performance and efficiency of a company and to set rates accordingly.
>
> 4. MPC has recently filed a notice to increase rates, and it is timely and reasonable to begin the study and establishment of a new Performance Evaluation Plan with that company.
>
> 5. MPC should . . . develop . . . a plan which permits this commission to establish rates based upon a consideration of the company's performance.
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> IT IS, THEREFORE, ORDERED that MPC . . . submit . . . a procedure or plan whereby this Commission can, if adopted, evaluate the performance of MPC's utility responsibility and obligations, from time to time, and based

which the MSPC required the Mississippi Power Company (MPC) to file a performance evaluation plan (PEP).[30] In the face of much opposition, on August 7, 1986, the MPSC issued a final order adopting the PEP as a new rate.[31] The Attorney General, acting on behalf of the State of Mississippi, appealed the adoption of the PEP to the Mississippi Supreme Court,[32] which subsequently found that the PEP was in fact a rate implemented by the MPSC.[33] Reviewing sections 77-3-39[34]

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upon those performance evaluations to determine the reasonableness of MPC's rates . . . .

Id. at 368-69. MPC filed its version of the PEP, and on April 4, 1986, the MPSC gave notice to the public instructing them to file comments. *Id.* at 369. Intervening in the action were the State of Mississippi *ex rel.* Pittman, Gen. Motors Corp. (GMC), the Mississippi Trial Lawyers Association, and others. *Id.*

[30] *Id.* at 369. At the hearing, counsel for the Attorney General (AG) stated that the MPSC had the authority only to review new rate-making techniques and that if MPSC wanted to implement the PEP as a new rate, the appropriate course of action would be to have the legislature change the law. *Id.* The Attorney General's counsel then requested a ruling by the MPSC, which was denied, that the hearing was purely investigative and would not result in a rate change. *Id.*

[31] *Id.* In its basic form, the PEP operates by making a quarterly comparison of MPC's actual earned return on equity for the preceding twelve month period with the returns of utilities with the same bond rating as MPC. The plan excludes utilities that have suspended dividends. *Id.* The PEP averages the cost of common equity by using a Discounted Cash Flow (DFC) model. *Id.* The average (or Benchmark Return of Equity (BROE)) represents the percentage return of equity which MPC should have received in comparison to similar utilities. *Id.* If MPC's BROE is above or below that of similar utilities, an adjustment in revenues may be necessary, but such adjustment is not to exceed a 2% cap for any one quarter. *Id.* A significant ingredient in MPC's performance rating was made up of seven indicators which included: (1) construction performance, (2) contribution to load factor, (3) customer satisfaction, (4) equivalent availability, (5) residential cost, (6) safety, and (7) service reliability. *Id.* at 370. On the basis of these indicators, MPC's total performance rating is computed after being combined with its BROE. *Id.*

[32] *Id.* at 370. Appellants first argued that the MPSC's statutory power was limited to determining just and reasonable rates and did not extend to adopting new rate setting methods and, second, that PEP directly contravened certain statutory procedures and generally circumvented the utilities regulation statutes. *Id.* at 372.

[33] *Id.* at 372. The court stated that there are no definite rules or legal formulas by which the reasonableness of rates charged, or to be charged, by a public utility is determined, and the determination of whether a plan is a rate is a question of fact requiring the exercise of sound discretion and independent judgment in each case. *Id.*

[34] *Id.* at 375. The court cited Miss. Code Ann. § 77-3-39(1) (1972), which provides, "[T]he commission shall hold such hearing in every case in which the change in rates constitutes a major change in rates, defined in Section 77-3-37(10)." *Pittman*, 538 So. 2d at 375. Miss. Code Ann. § 77-3-37(10) provides, " 'Major changes' means . . . an increase in rates which would increase the annual revenues of such public utility more than the greater of One Hundred Thousand Dollars ($100,000.00) or two percent (2%) . . . ."

and 77-3-47[35] of the Mississippi Code, the court stated that the requirements of both statutes must be met whenever a public utility petitions the MPSC for a rate change, and that the PEP must also satisfy the statutes even though its conception grew out of a MPSC initiated proceeding.[36] Finding that the PEP violated the general public policy of the utilities regulation[37] and circumvented specific statutory provisions,[38] the court held that the order implementing the PEP was void.[39]

III. Franchise Tax Base

Turning to the realm of taxes, the Mississippi Supreme Court was faced with the question of whether a liability account, whose amount due continues to be available for a company's use, is a definite known fixed liability within the meaning of section 27-13-9 of the Mississippi Code. The case of *Gencorp, Inc. v. State Tax Commission*,[40] grew out of an assessment of additional franchise taxes against Gencorp, Inc. by

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Miss. Code Ann. § 77-3-37(10) (1972).

[35] *Pittman*, 538 So. 2d at 374-75. The court cited Miss. Code Ann. § 77-3-41 (Supp. 1989), which contains the following language: "Whenever the Commission, after hearing had pursuant to the procedure set forth in Section 77-3-39 *and* Section 77-3-47 . . ." *Pittman*, 538 So. 2d at 374. The court reasoned that the "and" in § 77-3-41 means that the two sections were to be considered together in determining the procedure to be followed by the MPSC. *Pittman*, 538 So. 2d at 374-75. The court next turned to § 77-3-47 and found that it included no procedure for the MPSC to initiate rate changes. *Id.*

[36] *Pittman*, 538 So. 2d at 375.

[37] *Id.* The court found that the purposes and public policy behind the legislature's grant of regulatory power to the MPSC was stated in Miss. Code Ann. § 77-3-2 (Supp. 1989). *Pittman*, 538 So. 2d at 373. Miss. Code Ann. § 77-3-2 provides that the policy is:

> (a) To provide fair regulation of public utilities in the interest of the public;
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> (b) To promote the inherent advantage of regulated public utilities;
>
> (c) To promote adequate, reliable and economical service to all citizens and residents of this State;
>
> (d) To provide just and reasonable rates and charges for public utility services without unjust discrimination,. . . .

Miss. Code Ann. § 77-3-2 (Supp. 1989).

[38] *Pittman*, 538 So. 2d at 375. The court found that the PEP circumvented the public hearing requirement for all cases involving any rate increase which would result in greater than a 2% increase in annual revenues. *Id.*

[39] *Id.* The court found that the plain and unambiguous meaning of §§ 77-3-39 and 77-3-47 must be satisfied whenever there is a request for a rate change and that the rate PEP must satisfy the statutes in spite of the fact that it grew out of a MPSC initiated proceeding. *Id.*

[40] 543 So. 2d 657 (Miss. 1989).

the Mississippi State Tax Commission (MSTC).[41] In October, 1983, the MSTC conducted an audit of Gencorp for the tax years 1979 through 1982.[42] The MSTC assessed an additional franchise tax of $59,645,[43] based upon four accounts[44] which Gencorp carried on its books as liabilities but which the auditor considered as capital assets thus includable in Gencorp's franchise tax base.[45] Gencorp appealed the chancery court's decision upholding the MSTC's assessment and assigned three errors[46] which, when combined, presented the single issue of whether

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[41] *Gencorp*, 543 So. 2d at 657. During the relevant fiscal years of November 30, 1979, to 1982, Gencorp, a manufacturer of wall covering at its plant in Columbus, Mississippi, was a corporation organized in Ohio, maintaining its principal office in Akron, Ohio, and qualified to do business in Mississippi. *Id.* at 658.

[42] *Id.* at 658. In October, 1983, the MSTC Bureau of Audit carried out an audit of Gencorp's combined income and franchise returns for the years 1979 through 1982. *Id.*

[43] *Id.* The assessment was for additional franchise tax of $46,727 plus accrued interest of $12,918. *Id.*

[44] *Id.* at 658-59. The accounts which resulted in the MSTC 's assessment of additional tax were the Deferred Federal Income Tax Account, Deferred State and Local Income Tax Account, Workers' Compensation Claims Payable Account and the Provision for Plant Shutdown Account. *Id.*

[45] *Id.* at 659. For the years under review, Gencorp, in determining its franchise tax base for the calculation of franchise taxes, included the workers' compensation payable account in its tax base but omitted the two income tax accounts and the plant shutdown account. *Id.* The MSTC claimed that all of these accounts were includable in the franchise tax base, and the Chancery Court of Lowndes County affirmed the MSTC's decision. *Id.*

[46] *Id.* at 657-58. The three errors assigned by Gencorp were as follows:

I.

THE LOWER COURT ERRED IN FINDING THAT THE DEFERRED FEDERAL INCOME TAX ACCOUNT, THE DEFERRED STATE AND LOCAL INCOME TAX ACCOUNT, THE ACCOUNT FOR PROVISION FOR PLANT SHUTDOWN AND THE WORKMEN'S COMPENSATION CLAIMS PAYABLE ACCOUNT OF GENCORP, INC., INVOLVED CONTINGENCIES, AND THAT THESE ACCOUNTS ARE PROPERLY INCLUDED IN THE FRANCHISE TAX BASE WITHIN THE MEANING OF MCA § 27-13-9 (SUPP. 1989), AND ARE NOT EXCLUDABLE FROM THE FRANCHISE TAX BASE AS RESERVES REPRESENTING "DEFINITE KNOWN FIXED LIABILITIES."

II.

THE LOWER COURT ERRED IN FAILING TO FIND THAT THE BOOK VALUE AS REGULARLY EMPLOYED BY GENCORP, INC. IN CONDUCTING ITS AFFAIRS WAS PRIMA FACIE CORRECT AND THAT ITS BOOKS DID REPRESENT THE TRUE VALUE OF THE CAPITAL OF GENCORP, INC., FOR FRANCHISE TAX PURPOSES.

III.

THE LOWER COURT ERRED IN FINDING THAT IN ADMINISTERING FRANCHISE TAX, THE MISSISSIPPI STATE TAX COMMISSION HAS

the accounts were properly includable in Gencorp's statutorily defined capital which serves as a basis for the imposition of the franchise tax.[47] The court held that sections 27-13-9[48] and 23-13-11[49] of the Mississippi Code specifically require inclusion of the liability accounts in computing Gencorp's tax base for the computation of franchise tax since they were not "definite known fixed liabilities."[50] In conclusion, the court

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HISTORICALLY AND CONSISTENTLY CONSTRUED THE TERM "DEFINITE KNOWN FIXED LIABILITIES" NOT TO INCLUDE ANY ACCOUNT THAT REPRESENTS A CONTINGENCY OR AN ESTIMATE OF LIABILITY IN COMPUTING THE FRANCHISE TAX BASE.

Id.

[47] *Id.*

[48] *Id.* at 659-60. MISS. CODE ANN. § 27-13-9 provides:

> The tax imposed, levied, and assessed, under the provisions of this chapter, shall be calculated on the basis of the *value of the capital employed in this state* for the year preceding the date of filing the return, whether a calendar year, or fiscal year, except where otherwise provided in this chapter, *measured by the combined issued and outstanding capital stock, surplus and undivided profits; provided, that in computing capital, surplus and undivided profits, there shall be included all true reserves, including all reserves other than for definite known fixed liabilities which do not enhance the value of assets; and amounts designated for the payment of dividends shall be excluded from such calculations, until such amounts are definitely and irrevocably placed to the credit of stockholders, subject to withdrawal on demand; provided, however, there shall not be included debts, notes, bonds and mortgages due and payable; nor depreciation reserves, bad debt reserves, nor reserves representing valuation accounts.* But in no case shall the franchise tax so computed be less than ten dollars for the period covering which the return is filed. In no case shall the determined capital in Mississippi be less than the assessed value of the real estate and tangible personal property in Mississippi for the year preceding the year in which the return is due.

MISS. CODE ANN. § 27-13-9 (1972) (emphasis supplied by court).

[49] *Gencorp*, 543 So. 2d at 660. MISS. CODE ANN. § 23-13-11, in pertinent part, provides: "In all cases for the purpose of determining the amount of capital, *the book value as regularly employed in conducting the affairs of the corporation shall be accepted as prima facie correct as to the true capital of the organization.*" MISS. CODE ANN. § 23-13-11 (1972) (emphasis supplied by court).

[50] *Gencorp*, 543 So. 2d at 660. The court stated that since there was no money in the liability accounts, the amount in them served only as a deduction from net income which ultimately reduced retained earnings. *Id.* The court found that the funds represented by the liability accounts were available for use by Gencorp at all times and that it was conceivable that Gencorp would never have to pay the amounts represented therein. *Id.* The court relied upon Truckline Gas Co. v. State Tax Comm'n, which held that the MSTC has consistently construed the term "definite known fixed liabilities" not to exclude from the franchise tax base any account that represents a contingent liability or an estimate of liability. *Id.* (citing Truckline Gas Co. v. State Tax Comm'n, 119 So. 2d 378, 379 (Miss. 1960)).

made clear that it is not how an account is labeled that determines its includability in the franchise tax base, but it is instead the nature of the account and the taxpayer's rights in the equity which cause it to be includable in the tax base.[51]

IV. Administrative Procedure

In a short but dexterous manner, the Mississippi Supreme Court disposed of a case which is doubtless the most important decision in the area of administrative law for 1989. In the case of *State Oil & Gas Board v. McGowan*,[52] John McGowan, in a proceeding pending before the Oil & Gas Board (Board), sought discovery of certain information from the Board.[53] McGowan filed a complaint[54] requesting that the Board respond to all discovery in accordance with the Mississippi Rules of Civil Procedure.[55] The Board filed an interlocutory appeal[56] to resolve the two new principles of law presented in this case: first, whether the discovery process provided by the Mississippi Rules of Civil Procedure apply to proceedings before administrative bodies, agencies and commissions;[57] and, second, in view of the new rules of civil procedure, the availability of the pure or strict bill of discovery in chancery to obtain a limited form of discovery for use in administrative

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[51] *Id.* at 661. *See* Mississippi State Tax Comm'n v. Dyer Inv. Co., 507 So. 2d 1287, 1288-89 (Miss. 1987) (court approved principle that funds which were presently available for use by the corporation were subject to franchise tax).

[52] 542 So. 2d 244 (Miss. 1989).

[53] *McGowan*, 542 So. 2d at 245. McGowan wanted certain information from the Board in order to prepare for hearing on the merits of the pending matter. *Id.* McGowan's request for pre-administrative hearing discovery was denied by the Board. *Id.*

[54] *Id.* at 246. McGowan filed the complaint in the Chancery Court of the First Judicial District of Hinds County, Mississippi. *Id.*

[55] *Id.* In addition to discovery, McGowan sought a temporary injunction against the Board from continuing to hear matters pending before the Board until after the conclusion of discovery. *Id.* The Board filed a motion to dismiss for lack of personal jurisdiction and subject matter jurisdiction and for failure to state a claim upon which relief could be granted. *Id.* The Board argued that the Mississippi Rules of Civil Procedure did not apply to proceedings before an administrative agency, that the statutes, rules and regulations of the Board did not provide for discovery, that Mr. McGowan had failed to exhaust his administrative remedy, and that Miss. Code Ann. § 53-1-41 (1972), involving injunctions against the Board, was controlling. *Id.*

[56] *Id.* McGowan amended his complaint stating the proceeding was a pure bill of discovery in chancery and thus ancillary to the proceedings before the Board. *Id.* The Board filed a motion to dismiss which was denied by the chancery court, and in response, the Board filed its application requesting interlocutory appeal from the denial to resolve the new principles of law involved in the case. *Id.*

[57] *Id.*

proceedings.[58] In deciding the first issue, the Mississippi Supreme Court stated that the general rule in other jurisdictions is that the rules of civil procedure do not apply to administrative proceedings unless the rules specifically so provide.[59] The court found that the scope of the Mississippi Rules of Civil Procedure[60] governed the procedures in all civil lawsuits[61] in Mississippi but that the primary source for all procedural rules before the Board was the Mississippi Administrative Procedures Law.[62] As to the first issue presented, the court held that

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[58] *Id.* The board also filed a motion to stay a subpoena duces tecum issued to Dr. Richard Henderson, Supervisor of the State Oil & Gas Board, and/or the pure bill of discovery until the interlocutory appeal could be taken. *Id.*

[59] *Id.* at 247; *see* Georgia State Bd. of Dental Examiners v. Daniels, 224 S.E.2d 820, 822 (Ga. 1976) (stating that rules of civil procedure do not apply to administrative proceedings unless rules specifically so provide); International Ass'n of Firefighters, Local 2287 v. City of Montpelier, 332 A.2d 795, 797 (Vt. 1975) (same); Quaker Oats Co. v. Cedar Rapids Human Rights Comm'n, 268 N.E.2d 278, 282 (Ohio 1974) (same); Clary v. National Friction Prod., Inc. 291 N.E.2d 53, 55-56 (Ind. 1972) (same).

[60] *McGowan*, 542 So. 2d at 247. The scope of the rules of civil procedure is found in MISS. R. CIV. P. 1. *Id.*

[61] MISS. R. CIV. P. 1. The Mississippi Rules of Civil Procedure govern the procedures of the circuit courts, chancery courts, and county courts in all suits of a civil nature. *Id.*

[62] *Id.* The court found that one source of all procedural rules before the State Oil & Gas Board was the Mississippi Administrative Procedures Law, MISS. CODE ANN. § 25-43-1 to -19, which provides:

> (1) In addition to other rule-making authority and requirements imposed by law, each agency shall:
>
> (a) Adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information or make submissions or requests.
>
> (b) Adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including all requirements respecting the filing of applications for any license and the licensing procedure employed by the agency and the method whereby persons desiring notice of pending applications may obtain such notice and request an opportunity to be heard.
>
> (c) Allow public inspection of all rules and other written statements of policy or interpretations formulated, adopted or used by the agency in the discharge of its functions.
>
> (d) Allow public inspection of all final orders, decisions and opinions.
>
> (2) No agency rule, order or decision is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection as herein required. This provision is not applicable in favor of any person or party who has actual knowledge thereof.

MISS. CODE ANN. § 25-43-5 (Supp. 1989). Furthermore, MISS. CODE ANN. § 53-1-17 authorizes the Board to make "such reasonable rules, regulations and orders as may be necessary from time to time in the proper administration and enforcement of the provisions of

the Mississippi Rules of Civil Procedure did not apply to the administrative proceeding pending before the Board and that neither the Administrative Procedures Act nor the Rules of Procedure of the Board provided for any discovery procedure.[63] In addressing the second issue, the court stated that Mississippi Rule of Civil Procedure 82(a) makes clear that the rules in no way have altered the jurisdiction or the power of the courts to grant substantive relief.[64] Following review of section 53-1-39 of the Mississippi Code,[65] the court held that an appeal may be subject to judicial review only when there has been a final rule, regulation, or order by the administrative agency.[66]

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§§ 55-1-1 through 53-1-47, inclusive, and §§ 53-3-1 through 53-3-21, inclusive . . . ." MISS. CODE ANN. § 53-1-17 (Supp. 1988).

[63] *McGowan*, 542 So. 2d at 247-48.

[64] *Id.* at 249. The court stated that the terminology of a "Bill of Discovery" has been rendered obsolete and that the adoption of the new rules affected procedure, not substance. *Id.* Accordingly, the court found that the power and authority of the chancery court to grant the substantive relief of "discovery" remains viable and available, although it has been broadened and simplified by MISS. R. CIV. P. 26-37. *McGowan*, 542 So. 2d at 249.

[65] *McGowan*, 542 So. 2d at 249-50. MISS. CODE ANN. § 53-1-39 contains a provision for judicial review of the board's action which states:

> In addition to other remedies now available, the state, or any interested person aggrieved by any *final* rule, regulation or order of the board, shall have the right, regardless of the amount involved, of appeal to the Chancery Court of the First Judicial District of Hinds County, Mississippi, or to the chancery court of the county in which all or a part of appellant's property affected by such rule, regulation or order is situated, which shall be taken and perfected as hereinafter provided, within thirty (30) days from the date that such final rule, regulation or order is filed for record in the office of the board; and the said chancery court may affirm such rule, regulation or order, or reverse same for further proceedings as justice may require.

MISS. CODE ANN. § 53-1-39(a) (Supp. 1989) (emphasis supplied by court).

[66] *McGowan*, 542 So. 2d at 249-50. The court concluded by stating that the chancery court had no jurisdiction to participate in the administrative process prior to an appeal from a final rule, regulation, or order, and that it was error to do so when the effect amounted to an intervention in the pending proceeding. *Id.*

CIVIL PROCEDURE

The 1989 Mississippi Supreme Court addressed a diverse range of civil procedure issues, including affirmative defenses,[1] appeals,[2] counterclaims,[3] demurrers,[4] directed verdicts,[5] discovery sanctions,[6] election review,[7] full faith and credit,[8] interlocutory appeals,[9] interpleaders,[10]

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[1] Bailey v. Georgia Cotton Goods Co., 543 So. 2d 180, 183 (Miss. 1989) (where MISS. CODE ANN. § 79-3-247 (1972) is pled as affirmative defense, statute will not operate as defense on merits unless suggestion is made rebutting allegations contained in complaint).

[2] Moore v. Wax, 554 So. 2d 312, 313 (Miss. 1989) (when computing time period for notice of appeal, last day is not included only if it falls on Saturday, Sunday, legal holiday, or any other day when clerk's office is in fact closed); Tandy Elec. v. Fletcher, 554 So. 2d 308, 310 (Miss. 1989) (where notice of appeal is not timely filed, MISS. SUP. CT. R. 2(a)(1) strictly construed); Perkins v. Thompson, 551 So. 2d 204, 209 (Miss. 1989) (no notice necessary in action seeking adjudication of paternity; filing requirement was met when petition for administratrix was filed).

[3] Fulgham v. Snell, 548 So. 2d 1320, 1322 (Miss. 1989) (where suit filed in equity gives rise to compulsory counterclaim, it must be asserted in that proceeding or waived, even if counterclaim is perceived to be at law).

[4] Holland v. Kennedy, 548 So. 2d 982, 987 (Miss. 1989) (where evidence supporting allegations of malice and knowledge of falsity were sufficient in law, demurrer based upon qualified privilege of employer-employee relationship may not be sustained).

[5] Winstead v. Berry, 556 So. 2d 321, 323 (Miss. 1989) (motion for directed verdict requires consideration of evidence in light most favorable to nonmovant, accepting as true all favorable inferences supporting nonmovant's case); Dunn v. Jack Walker's Audio Visual Center, 544 So. 2d 829, 833 (Miss. 1989) (where court refuses to direct verdict on liability and jury returns verdict and awards damages, court's failure to direct verdict is harmless error unless proven that such error in fact produced compromise verdict).

[6] Cunningham v. Mitchell, 549 So. 2d 955, 960 (Miss. 1989) (where plaintiff either fails to respond adequately to discovery requests or wholly fails to respond, defendant's relief may include dismissal with prejudice); Hapgood v. Biloxi Regional Medical Center, 540 So. 2d 630, 635 (Miss. 1989) (where plaintiff's noncompliance with discovery order was partly based upon inability to comply and defendant was not substantially prejudiced by noncompliance, dismissal was inappropriate).

[7] Pearson v. Parson, 541 So. 2d 447, 454 (Miss. 1989) (special tribunal established for election review has full authority and scope of administrative hearing, controlled by MISS. R. CIV. P. and applicable statutes).

[8] Sollit v. Robertson, 544 So. 2d 1378, 1381-82 (Miss. 1989) (where foreign court has both subject matter jurisdiction and in personam jurisdiction, judgment rendered is conclusive and may be challenged in Mississippi only to extent allowed by law of such foreign court).

[9] Donald v. Reeves Transp. Co., 538 So. 2d 1191, 1194 (Miss. 1989) (interlocutory appeals are not of right and are allowed from circuit courts only in exceptional circumstances).

jurisdiction,[11] jury instructions,[12] jury selections,[13] post-trial motions,[14] relief from judgments,[15] res judicata,[16] Rule 11 sanctions,[17] statutes of limitation,[18] summary judgment,[19] supreme court internal operating

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[10] Robertson v. La Linda, Inc., 548 So. 2d 1308, 1312 (Miss. 1989) (regarding interpleaders, courts should assume jurisdiction of counterclaims and crossclaims arising out of, or relating to, occurrence or transaction forming basis of suit).

[11] Tillotson v. Anders, 551 So. 2d 212, 218 (Miss. 1989) (MISS. CONST. art. 6, § 147 applicable primarily to final judgments in cases where there has been full hearing on merits in incorrect forum); Penton v. Penton, 539 So. 2d 1036, 1038 (Miss. 1989) (where plaintiff complies with mandates of MISS. CODE ANN. § 93-11-67 (1972), non-resident defendant's minimum contacts ensured, thus conferring court with jurisdiction to render money judgment); Riley v. Moreland (*Moreland III*), 537 So. 2d 1348, 1352 (Miss. 1989) (where sole heir is minor, action for declaratory judgment to determine attorney fees for representation in wrongful death claim is against estate of decedent's sole heir, and proper venue and subject matter jurisdiction is in county where sole heir's guardianship was established); Moreland v. Riley (*Moreland II*), 537 So. 2d 1345, 1348 (Miss. 1989) (where administratrix appeals from judgment affecting fiduciary character under MISS. CODE ANN. § 11-51-99 (Supp. 1989), appeal is automatically with supersedeas).

[12] Elam v. Pilcher, 552 So. 2d 814, 817 (Miss. 1989) (where peremptory instruction charges defendant with negligence as matter of law, instruction to jury that plaintiff must prove negligence by preponderance of evidence is reversible error).

[13] Hudson v. Taleff, 546 So. 2d 359, 363 (Miss. 1989) (where statistical aberrations in jury pool indicate strong likelihood of opportunity for undue influence over jury, trial judge must take corrective measures to ensure unbiased jury).

[14] Clark v. Viniard, 548 So. 2d 987, 991 (Miss. 1989) (where trial court expands motion for new trial on issue of damages into motion for new trial on all issues, court is not acting on its own initiative so as to be prohibited from acting more than 10 days after entry of judgment).

[15] Burkett v. Burkett, 537 So. 2d 443, 446 (Miss. 1989) (where motion is made pursuant to MISS. R. CIV. P. 60(b)(6), trial court has broad equitable powers to determine what constitutes "reasonable time" in which to make such motion).

[16] Lambert v. Lawson, 538 So. 2d 767, 770 (Miss. 1989) (where foreign jurisdiction eliminates special appearance and where issue of personal jurisdiction was litigated and lost, issue may not be relitigated in Mississippi).

[17] Nationwide Mut. Ins. Co. v. Evans, 553 So. 2d 1117, 1120 (Miss. 1989) (neither parties nor their attorneys were under continuing duty to monitor pleadings to ascertain frivolous claim or defense); Russell v. Lewis Grocer Co., 552 So. 2d 113, 117 (Miss. 1989) (although motion for sanctions are untimely if filed more than 10 days after entry of judgment, sanctions may be imposed for frivolous appeal under MISS. SUP. CT. R. 38 and 46(d)); Tricon Metals & Servs., Inc. v. Topp, 537 So. 2d 1331, 1335 (Miss. 1989) (where plaintiff has no hope of success, trial court has authority to impose sanction *sua sponte*).

[18] Patton v. Mack Trucks, Inc., 556 So. 2d 679, 680 (Miss. 1989) (action filed in Mississippi subject only to Mississippi's statute of limitations; dismissal in another state based upon that state's statute of limitations not res judicata).

[19] Cunningham v. Lanier, 555 So. 2d 685, 687 (Miss. 1989) (when converting motion for judgment on pleadings to motion for summary judgment, procedural rules are liberally construed to permit party to file amendments or documents in opposition); Foldes v. Hancock Bank, 554 So. 2d 319, 322 (Miss. 1989) (summary judgment not appropriate

rules,[20] and venue.[21] Cases receiving textual discussion confront the issues of whether a plaintiff's inability to comply with a discovery order should give rise to dismissal of the lawsuit,[22] whether failure to respond adequately to discovery requests mandates dismissal with prejudice,[23] whether a trial court may impose Rule 11 sanctions *sua sponte*,[24] whether parties or their attorneys are under a continuing duty to monitor their pleadings for frivolous claims or defenses,[25] and whether the provision of article six, section 147 of the Mississippi Constitution, which restricts authority to reverse on the sole ground that a case was litigated in the wrong court, is limited to final judgments.[26]

I. Discovery Sanctions

The Mississippi Supreme Court addressed two related issues regarding discovery sanctions in *Hapgood v. Biloxi Regional Medical Center*[27] and in *Cunningham v. Mitchell*.[28]

The primary issue in *Hapgood* concerned whether dismissal with

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where there are genuine issues of material fact); Estate of Magee v. Transcontinental Gas Pipe Line Corp., 551 So. 2d 182, 187 (Miss. 1989) (party opposing summary judgment must rely on sworn documents, made upon personal knowledge by competent party); Biloxi Regional Medical Center, Inc. v. Estate of Ross, 546 So. 2d 667, 671 (Miss. 1989) (summary judgment inapplicable in contests of probated claims because inconsistent with statutory proceedings of Miss. Code Ann. §§ 41-9-119, 93-7-165 (Supp. 1989)); Key Constructors, Inc. v. H & M Gas Co., 537 So. 2d 1318, 1322 (Miss. 1989) (where diversion of material by subcontractor was alleged, neither prime contractor nor surety was exonerated from debt liability owed materialman; therefore, claims of diversion were not material to summary judgment).

[20] Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848, 894 (Miss. 1989) (Hawkins, J., dissenting on petition for rehearing) (although justice who did not participate in original decision may not participate in petition for rehearing, any duly constituted justice should be allowed to participate in cases involving only questions of law).

[21] Missouri Pac., R.R. v. Tircuit, 554 So. 2d 878, 881 (Miss. 1989) (doctrine of forum non conveniens applicable to actions against railroads, notwithstanding special railroad venue statute, Miss. Code Ann. § 11-11-15 (Supp. 1989)).

[22] Hapgood v. Biloxi Regional Medical Center, 540 So. 2d 630 (Miss. 1989); *infra* notes 29-44 and accompanying text.

[23] Cunningham v. Mitchell, 549 So. 2d 955 (Miss. 1989); *infra* notes 45-60 and accompanying text.

[24] Tricon Metals & Serv., Inc. v. Topp, 537 So. 2d 1331 (Miss. 1989); *infra* notes 63-71 and accompanying text.

[25] Nationwide Mut. Ins. Co.v. Evans, 553 So. 2d 1117 (Miss. 1989); *infra* notes 72-82 and accompanying text.

[26] Tillotson v. Anders, 551 So. 2d 212 (Miss. 1989); *infra* notes 84-91 and accompanying text.

[27] 540 So. 2d 630 (Miss. 1989); *infra* notes 29-44 and accompanying text.

[28] 549 So. 2d 955 (Miss. 1989); *infra* notes 45-60 and accompanying text.

prejudice of the plaintiff's suit for failure to comply with court-ordered discovery was appropriate when such failure was in part due to the plaintiff's inability to comply with the court's order.[29]

Audrey Ellis Hapgood was admitted against her will to the psychiatric ward of the Biloxi Regional Medical Center by Dr. Malcolm Latour at the request of her husband, William Hapgood.[30] Two years after her official discharge, Mrs. Hapgood filed suit in the Circuit Court of Jackson County, Mississippi, alleging false imprisonment and negligence against Dr. Latour and the hospital.[31] Audrey Hapgood subsequently obtained a divorce from William Hapgood, and as part of her evidence of habitual cruel and inhuman treatment, she introduced copies of certain portions of her husband's diaries.[32] Dr. Latour filed a request for production of documents, requesting Audrey Hapgood to produce the original diaries of William Hapgood.[33] Audrey Hapgood filed an answer to Dr. Latour's request, alleging that she could not produce the original diaries because they were no longer under her care, custody, or control.[34] The court ordered her to produce the original diaries or suffer dismissal of her suit.[35] At the hearing, Audrey Hapgood testified that prior to the initiation of this suit, she had given the diaries to a third party to be delivered to a family member in Ireland because her ex-husband had threatened to kill her in order to retrieve the diaries.[36] She also testified that her trailer had been broken into and that certain items, including her passport, had been stolen.[37] When she did not pro-

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[29] *Hapgood*, 540 So. 2d at 634.

[30] *Id.* at 631. Audrey Hapgood remained at the hospital for two and one-half months and was diagnosed as having a schizophrenic reaction of the acute paranoid type. *Id.* She received 15 electroconvulsive treatments during her hospital stay. *Id.*

[31] *Id.* at 632. The circuit court heard motions for summary judgment and found that Audrey Hapgood's false imprisonment claim was barred by the statute of limitations. *Id.* The court granted both appellees partial summary judgment on that issue. *Id.*

[32] *Id.* During trial the authenticity of the copies was admitted. *Id.* At the time Audrey Hapgood instituted suit against the hospital, William Hapgood was deceased. *Id.*

[33] *Id.*

[34] *Id.* Audrey Hapgood had produced copies, but not originals, of the diaries. *Id.*

[35] *Id.* Audrey Hapgood was given until January 25, 1986, to produce the diaries, and in response, she filed a motion to suspend the court-ordered discovery because the original diaries were in Ireland and it would therefore be dangerous for her to retrieve them. *Id.* On February 13, 1986, the court ordered Mrs. Hapgood to comply by March 4, 1986, or suffer dismissal. *Id.* On February 26, 1986, Mrs. Hapgood again requested suspension of the court's discovery order, alleging "that she was unable to travel to Ireland because of her physical problems, financial hardship, and the theft of her passport." *Id.*

[36] *Id.*

[37] *Id.* The court ordered her to produce the originals by March 3, 1986, or suffer dismissal. *Id.* at 632-33. The court extended the deadline when Audrey Hapgood filed an

duce the diaries, the defendants filed motions to dismiss for failure to respond to discovery.[38] Audrey Hapgood filed her answer to these motions, stating that she had indeed traveled to Ireland and was unable to retrieve the diaries because her sister had refused to divulge their whereabouts.[39] The court dismissed Audrey Hapgood's lawsuit with prejudice.[40]

The Mississippi Supreme Court reversed the lower court's dismissal of Audrey Hapgood's action.[41] Citing *Batson v. Neal Spelce Associates*,[42] the court stated that dismissal is inappropriate where the failure to comply with a court's order did not result from willfulness or bad faith, but was instead attributable to an inability to comply.[43] The court stated that because Audrey Hapgood did make a trip to Ireland to attempt to retrieve the diaries, her claim fell under the "inability to comply" language of *Spelce*.[44]

The primary issue in *Cunningham v. Mitchell*[45] concerned whether dismissal with prejudice is proper when failure to respond adequately to discovery is entirely the fault of the plaintiff's attorney.[46] Tiffany Cunningham, a minor, brought suit through her mother, Patricia Cunningham, against Dr. Ernest Mitchell, alleging negligence in the preparation for and delivery of Tiffany.[47] During the course of discov-

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affidavit of her intent to travel to Ireland to produce the originals. *Id.* at 633.

[38] *Id.* at 633. Defendants also requested, in the alternative, summary judgment. *Id.*

[39] *Id.*

[40] *Id.* The court then entered an order setting aside its order of dismissal and staying all further proceedings until a hearing could be held to determine Audrey Hapgood's competency. *Id.* On June 27, 1986, Audrey Hapgood was declared competent and the court reinstated its order of dismissal on the ground that she had not complied with discovery. *Id.*

[41] *Id.* at 634. Regarding entry of summary judgment for the defendants, the court stated that Audrey Hapgood introduced testimony and/or affidavits of two expert witnesses who did not agree with the treatment she had received. *Id.* at 636-37. Further, the court stated that the diaries added credibility to her claim that her ex-husband's background should have been checked before he was allowed to commit her to the hospital and that, furthermore, she should be allowed an opportunity to prove that the statutory proceedings were not followed in committing her and that the electro-shock treatments were improper hospital procedure. *Id.* Therefore, the court found summary judgment to be inappropriate. *Id.* at 637.

[42] 765 F.2d 511 (5th Cir. 1985).

[43] *Hapgood*, 540 So. 2d at 634.

[44] *Id.*; *see Spelce*, 765 F.2d at 514 (dismissal appropriate only where failure to comply results from bad faith, where deterrent value of FED. R. CIV. P. 37 cannot otherwise be achieved or where other party was substantially prejudiced).

[45] 549 So. 2d 955 (Miss. 1989).

[46] *Cunningham*, 549 So. 2d at 960.

[47] *Id.* at 956.

ery, Dr. Mitchell filed a request for production of documents and interrogatories.[48] Tiffany's counsel, Jim Davis Hull,[49] requested and received an extension of time in which to respond.[50] After the deadline had passed and Hull still had not responded, Mitchell filed a motion to compel discovery.[51] At the hearing, the court ordered Hull to respond within twenty days or face dismissal.[52] After Hull filed the answers to Mitchell's interrogatories, the court found the answers to be insufficient and further found that Hull had wholly failed to comply with the court's order.[53] The trial court dismissed the case with prejudice.[54]

On appeal, appellant argued, *inter alia*, that sanctions were governed by Mississippi Rules of Civil Procedure 37(b)(2) and that dismissal with prejudice constituted an abuse of discretion.[55]

The Mississippi Supreme Court affirmed, stating that Rule 37(b)(2) must be read in conjunction with Rule 37(e), which allows the court to impose such sanctions as it deems just.[56] The court cited *Kilpatrick v. Mississippi Baptist Medical Center*,[57] in which dismissal with prejudice was upheld, and distinguished both *Kilpatrick* and the case at bar from *White v. White*,[58] in which dismissal with prejudice was reversed as being too harsh.[59] The court stated that the trial court must weigh the plaintiff's interest against the defendant's costs in terms of both money and anxiety in determining when dismissal is appropriate.[60]

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[48] *Id.*

[49] *Id.* Hull is an attorney in Moss Point, Mississippi. *Id.* at 955.

[50] *Id.* at 956.

[51] *Id.* Hull filed a motion for continuance by mail but failed to notify the court of his request. *Id.* The clerk received Hull's request the day after the hearing on the motion to compel and filed it. *Id.* at 957. At the hearing on Hull's motion for continuance, Hull assured the court that he had filed his responses to discovery, but he could not explain why neither the court nor Mitchell's counsel had received the answers. *Id.* The court reserved its ruling on Hull's request until it had seen Hull's answers to the interrogatories, which Hull filed the next day. *Id.*

[52] *Id.* at 956-57. The court also assessed Hull with $200 in sanctions. *Id.* at 957.

[53] *Id.* at 957.

[54] *Id.*

[55] *Id.* at 957-58.

[56] *Id.* at 958.

[57] 461 So. 2d 765, 767 (Miss. 1984).

[58] 509 So. 2d 205, 209 (Miss. 1987).

[59] *Cunningham*, 549 So. 2d at 959-60. The court stated that *White* held that when neglect is attributable to an attorney, rather than to a party, dismissal may be inappropriate. *Id.* at 960. However, the court stated that *White* does not stand for the proposition that dismissal can never be allowed. *Id.*

[60] *Id.* at 960.

II. Rule 11 Sanctions

The Mississippi Supreme Court clarified its position on sanctions under Mississippi Rule of Civil Procedure 11 in *Tricon Metals & Services, Inc. v. Topp*[61] (*Tricon II*)and *Nationwide Mutual Insurance Co. v. Evans.*[62]

In *Tricon II*,[63] the Mississippi Supreme Court addressed the issue of whether a trial court may impose Rule 11 sanctions *sua sponte*.[64] The only question in dispute in *Tricon II* was whether the contractual relationship entered into between Tricon and Topp was memorialized by a written contract, or whether it was an oral contract supported by written notes and memoranda.[65] The trial court found that Topp had never signed any written contract with Tricon.[66] The trial court, acting on the authority pursuant to Mississippi Rule of Civil Procedure 11, awarded Topp $3,500 in attorney's fees because Topp had to defend the original complaint for injunction which was filed on a nonexistent contract.[67] Furthermore, the testimony of Tricon's witnesses placed before the court the issue of veracity, and witness veracity was imputed to the parties.[68] The trial court declared that since Tricon produced no witnesses to testify that they ever saw Topp sign a contract, and since the witnesses it did produce placed the truthfulness of all of Tricon's testimony in issue, the action was frivolous.[69]

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[61] 537 So. 2d 1331 (Miss. 1989); *infra* notes 63-71 and accompanying text.

[62] 553 So. 2d 1117 (Miss. 1989); *infra* notes 72-82 and accompanying text.

[63] *Tricon II*, 537 So. 2d at 1335-36. This is the second time this case was heard by the Mississippi Supreme Court. *Id.* at 1332. In the prior action, Tricon Metals Services, Inc. sued its former marketing manager, Jim Topp, alleging that Topp had committed various breaches of his employment contract. *Id.* at 1333; Tricon Metals & Servs., Inc. v. Topp (*Tricon I*), 516 So. 2d 236, 237 (Miss. 1987). The case was tried and appealed, with the Mississippi Supreme Court declaring that it had insufficient information and thus could not exercise its appellate review functions. *See id.* at 239 (case remanded for findings of fact and conclusions of law under Miss. R. Civ. P. 52(a)).

[64] *Tricon II*, 537 So. 2d at 1335-36.

[65] *Id.* at 1333. Tricon alleged that it had a written contract which specifically contained a non-competition clause. *Id.* Topp denied the existence of any such contract. *Id.*

[66] *Id.* Concerning Topp's counterclaim, the trial court found that because of a wide variance in testimony regarding the agreement on payment of commissions, as well as calculations by both parties, it was not possible to compute accurately the amount due Topp. *Id.* at 1333-34. Thus Topp failed to prove that Tricon owed him any further commissions. *Id.* at 1334. Accordingly, the trial court awarded no damages for payment of commissions. *Id.*

[67] *Id.* at 1334-35.

[68] *Id.* at 1335-36.

[69] *Id.* The court stated that "[w]hile courts are and ought to be slow to brand witnesses as liars, the Chancery Court in its opinion recognized that on certain issues the

The Mississippi Supreme Court affirmed the award of attorney's fees, stating that the trial court has authority implicit in the language of Rule 11 to act on its own initiative.[70] The court declared that trial courts have the authority to act *sua sponte* under Rule 11 and should exercise that authority "against the backdrop of their inherent authority to impose sanctions upon those who abuse the judicial process."[71]

In *Nationwide Mutual Insurance Co. v. Evans*,[72] the court confronted the issue of whether parties or their attorneys are under a continuing duty to monitor their post-complaint or post-answer pleadings and motions in order to ascertain whether subsequent events suggest that a claim or defense is frivolous.[73]

Ida Rose Yocum slipped and fell in a mail van and broke her leg.[74] Yocum filed suit against John L. Evans, the owner of the van, alleging in her complaint that she was employed by Evans and that his negligence caused her personal injuries, but Nationwide's file reflected information that suggested Yocum was not Evans' employee.[75] Nationwide's policy with Evans contained an employee exclusion.[76] Nationwide filed suit for declaratory relief, requesting that the court construe the insurance policy provision.[77] At trial, the court granted Evans a directed verdict on Nationwide's declaratory judgment actions and imposed sanctions on Nationwide under Mississippi Rule of Civil Procedure 11.[78] Nationwide appealed and argued, *inter alia*, that the

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testimony in this case placed 'squarely' before the court 'the truthfulness of all the witnesses' testimony.' " *Id.* at 1336.

[70] *Id.* at 1335. The court stated that although Topp's pleading made no specific reference to a request for attorney fees under Rule 11, he did demand punitive damages. *Id.*

[71] *Id.*

[72] 553 So. 2d 1117 (Miss. 1989).

[73] *Nationwide*, 553 So. 2d at 1120.

[74] *Id.* at 1118. Yocum was driving the mail van for the owner, John L. Evans, who delivered mail for the United States Postal Service. *Id.* Evans had his liability insurance with Nationwide Mutual. *Id.* When Yocum filed suit against Evans, Nationwide was notified and employed counsel to defend. *Id.*

[75] *Id.* Apparently regarding Yocum merely a substitute mail carrier, Evans had told a Nationwide claims representative that Yocum was not his employee. *Id.*

[76] *Id.* Nationwide also maintained that Evans had made material misrepresentations regarding his use of the van. *Id.* at 1119, 1121. More specifically, Evans had reported that the Ford van was used only for personal pleasure when it was in fact used for business purposes. *Id.* at 1121.

[77] *Id.* at 1119. Evans filed a counterclaim charging Nationwide with bad faith and demanded $50,000 in actual damages and $7 million in punitive damages. *Id.*

[78] *Id.* However, while Evans was not allowed to offer proof of his counterclaim, the court later ordered Evans to pay Rule 11 sanctions in favor of Nationwide based on the existence of another policy in effect of which Nationwide was unaware. *Id.* at 1121-22.

trial court employed incorrect legal standards regarding Rule 11 sanctions.[79]

The Mississippi Supreme Court reversed and rendered.[80] The court stated that it is the filing of a motion or pleading which triggers the possibility of Rule 11 sanctions.[81] The court further stated that although it would not be irrational to provide that parties and attorneys are under a continuing duty to monitor their pleadings and motions, no continuing duty is found in the language of Rule 11.[82]

III. Jurisdiction

Section 147 of article six of the Mississippi Constitution prohibits reversal of any judgment or decree of chancery or circuit court solely because of lack of subject matter jurisdiction.[83] In *Tillotson v. Anders*,[84] the Mississippi Supreme Court declared that section 147 restricts the authority of the court to reverse decisions only in cases where there has been a full hearing on the merits in an incorrect forum, or where by litigation, one party has gained a substantial advantage over the other.[85]

In May, 1987, *The Natchez Democrat* ("*Democrat*") began publishing articles and editorials attacking the office hiring practices of J. Odell Anders, Chancery Clerk of Adams County, Mississippi.[86] In October, 1987, Anders filed a complaint in chancery court claiming that

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[79] *Id.* at 1119-20. Evans cross-appealed and made substantially the same argument on appeal as Nationwide. *Id.* at 1121-22.

[80] *Id.* at 1122-23. The court also reversed and rendered Evans' cross-appeal. *Id.* The court stated that Rule 11(b) contains twin standards, frivolousness and harassment, and that a Rule 11 inquiry regarding frivolousness "is an objective one to be exercised from the vantage point of a reasonable party in [the litigant's] position as it filed . . . its claim." *Id.* at 1120 (quoting Tricon Metals & Servs., Inc. v. Topp, 537 So. 2d 1331, 1335 (Miss. 1989)).

[81] *Id.* at 1120.

[82] *Id.* The court found that Rule 11 does not embody such "continuing duty" language. *Id.* The court noted that while there was evidence which might disfavor Nationwide, it could not say that Nationwide's complaint had no hope of success. *Id.* Regarding the sanctions against Evans, the court stated that Rule 11 sanctions should not be imposed until the trial court has heard all of the evidence and the law which the sanctioned party says will negate any finding of frivolousness. *Id.* at 1122.

[83] Miss. Const. art 6, § 147.

[84] 551 So. 2d 212 (Miss. 1989).

[85] *Tillotson*, 551 So. 2d at 218.

[86] *Id.* at 213. The articles and editorials criticized Anders for the sizeable income his family received from his service in office as chancery clerk. *Id.* The *Democrat* stated that Anders had hired his wife and two daughters as deputy clerks and paid them substantial salaries. *Id.*

the articles were false and that the case could only be heard in chancery court due to the complex issues involved in an accounting which he was seeking.[87] The *Democrat* filed a motion to dismiss for lack of subject matter jurisdiction or, in the alternative, a motion to transfer the case to circuit court.[88] The chancery court denied the *Democrat's* motion to dismiss and refused to transfer the case.[89] The Mississippi Supreme Court granted the *Democrat's* interlocutory appeal.[90]

The Mississippi Supreme Court reversed the chancery court's dismissal of the *Democrat's* motion and remanded the case to the Circuit Court of Adams County, Mississippi, declaring this case to be outside the limited subject matter jurisdiction of the chancery court.[91] The court, citing *Talbot & Higgins Lumber Co. v. McLeod Lumber Co.*,[92] stated that section 147 was adopted to prevent the necessity of determining which court had proper subject matter jurisdiction at the end of a trial where the case had been properly adjudicated on the merits and thus overturning a just result.[93] The court then stated that section 147 applies primarily, although not exclusively, to final judgments or orders.[94]

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[87] *Id.* Anders in fact filed his complaint in the Chancery Court of Adams County. *Id.* Anders, in his complaint, demanded a declaratory judgment adjudicating that all of his receipts and disbursements were in conformity with the law. *Id.* Anders also demanded $500,000 in actual damages and $8 million in punitive damages, plus court costs and attorney's fees. *Id.*

[88] *Id.* Anders argued, in opposition to the *Democrat's* motion, that the chancery court had jurisdiction based upon three grounds: (1) that chancery courts historically have entertained jurisdiction over accountings; (2) that he sought to prevent a multiplicity of lawsuits by consolidating his accounting with other claims; and (3) that his request for declaratory relief enabled his case to be tried in chancery court. *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* at 218.

[92] 147 Miss. 186, 193-94, 113 So. 433, 435 (1927).

[93] *Tillotson*, 551 So. 2d at 217.

[94] *Id.* at 215. The court stated that an inherent tension exists between MISS. CONST. art 6, §§ 157 and 162.

MISS. CONST. art 6, § 157 provides that "[a]ll causes that may be brought in the circuit court whereof the chancery court has exclusive jurisdiction shall be transferred to the chancery court." *Id.*

MISS. CONST. art 6, § 162 provides that "[a]ll causes that may be brought in the chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court." *Id.*

The court stated that sections 157 and 162 are consistent if § 147 is read as restrict ing the authority to reverse cases where there has been a full hearing on the merits in the

incorrect forum. *Tillotson*, 551 So. 2d at 218. The court stated that its construction of section 147 in this decision was further mandated by the *Democrat's* right to trial by jury under MISS. CONST. art. 3, § 31. *Tillotson*, 551 So. 2d at 215.

Justice Hawkins dissented, joined by Justices Dan M. Lee, Sullivan and Pittman. *Id.* at 219 (Hawkins, J., dissenting). Justice Hawkins stated that the case should be reversed and remanded to the chancery court and that if the chancellor decided to retain jurisdiction, the defendants would have an inviolate right to demand a trial by jury. *Id.* at 226. Justice Hawkins, citing MISS. CODE ANN. § 11-5-3 (1972), stated that there is nothing in the statute's language which suggests that a jury verdict is less than binding upon a chancellor. *Tillotson*, 551 So. 2d at 226.

CORPORATE, CONTRACT AND COMMERCIAL LAW

During 1989 the Mississippi Supreme Court handed down seventeen decisions in the areas of corporate, contract, and commercial law. Only those decisions which have either expanded, clarified, or changed existing law will receive textual treatment. The decisions which will not receive textual treatment concerned the apparent authority of an agent to bind the principal,[1] a motion for directed verdict in a breach of contract case,[2] an architect's duty under a construction contract,[3] corporate dissolution,[4] the filing of a counter affidavit in a suit on an open account,[5] contract interpretation,[6] the rights of an assignee of a lease,[7] options to purchase,[8] and employment contracts.[9]

I. General Contract Principles

A. Statute of Frauds

One of this state's recognized exceptions to the statute of frauds is

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[1] Malta Life Ins. Co. v. Estate of Washington, 552 So. 2d 827, 830-32 (Miss. 1989) (where authorized agent of principal accepted premium for insurance, issued certificate of insurance, and delivered certificate to debtor, that agent has apparent authority to bind principal).

[2] Brewer v. Williams, 542 So. 2d 1186, 1187-88 (Miss. 1989) (where there is not any evidence to support verdict for plaintiff in breach of contract case, court should grant defendant's motion for directed verdict).

[3] U.R.S. Co. v. Gulfport Biloxi Regional Airport Auth., 544 So. 2d 824, 827 (Miss. 1989) (where architect failed to exercise ordinary professional skills and diligence in carrying out his nondelegable duty to inspect, he is liable for breach of that duty).

[4] Morris v. Macione, 546 So. 2d 969, 971-72 (Miss. 1989) (where corporation is dissolved solely to avoid its obligations and debts, dissolution will not be recognized).

[5] Rainbow Rental & Fishing Tools, Inc. v. Delta Underground Storage, Inc., 542 So. 2d 258, 261-62 (Miss. 1989) (failure to file counter-affidavit does not preclude defendant from challenging underlying contractual liability).

[6] Knight v. Sheppard Bldg. Supply, Inc., 537 So. 2d 1355, 1358 (Miss. 1989) (where contract is vague and ambiguous, courts must pursue intent of parties by resort to parol evidence and construe ambiguity more strongly against party who prepared it).

[7] Board of Trustees v. Peoples Bank, 538 So. 2d 361, 366 (Miss. 1989) (assignee of uncompleted/unauthorized lease has no greater rights in lease than those possessed by assignor).

[8] Busching v. Griffin, 542 So. 2d 860, 863-64 (Miss. 1989) (where property description and purchase price are set forth in option to purchase, agreement is enforceable as valid contract).

[9] Wicker v. Union County Gen. Hosp., No. 58691, slip op. at 9 (Miss. Nov. 15, 1989) (nurse was not entitled to work at hospital without contract).

the doctrine of equitable estoppel.[10] The Mississippi Supreme Court had to decide whether the application of the doctrine of equitable estoppel was proper in *Bowers Window & Door Co. v. Dearman.*[11]

Rick Dearman had been employed as a salesman for McGinnis Distributing Company since 1978.[12] Dearman sent a résumé to William Bowers, President of Bowers Window and Door Company, in 1986.[13] In August, 1986, Bowers contacted Dearman concerning an opening in the Jackson area.[14] Dearman turned down the offer to work in the Jackson area, but he questioned Bowers about expanding into the Meridian area, where Dearman was located.[15] The two parties met on September 3, 1986, and at that meeting, Bowers extended on behalf of the company an oral offer of employment to Dearman, which Dearman accepted.[16] The agreement provided that Dearman would work for Bowers as a sales representative in the Meridian area.[17] Bowers sent Dearman a confirmation letter which set forth that the position would pay a base income of $24,000 yearly and an expense account of $400 per month.[18] The duration of the employment contract was a term solely confined to an oral agreement.[19] Bowers contended that the employment agreement was for an indefinite term.[20] Dearman asserted that the offer of employment was for a definite term to run from September 15, 1986, through December of 1988.[21]

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[10] PMZ Oil Co. v. Lucroy, 449 So. 2d 201, 206 (Miss. 1984) (citing Martin v. Franklin, 245 So. 2d 602, 604-05 (Miss. 1971); Sanders v. Dantzler, 375 So. 2d 774, 776-77 (Miss. 1979)).

[11] 549 So. 2d 1309 (Miss. 1989).

[12] *Bowers Window & Door Co.*, 549 So. 2d at 1310.

[13] *Id.* Dearman stated in his cover letter that he would only change employment for a position which would be an advancement over his present position. *Id.* At McGinnis Distributing, Dearman was being paid $300 per month plus commissions. *Id.* In 1984, Dearman earned $41,000; in 1985 he earned $22,875.63; and by the middle of September, 1986, he had earned $20,844. *Id.*

[14] *Id.* Bowers had lost a sales representative from the Jackson area. *Id.*

[15] *Id.* Dearman had recently married and completed construction of a new home in Meridian. *Id.*

[16] *Id.* at 1311. Bowers contended that Dearman showed up uninvited at his office on September 3, 1986. *Id.* On the other hand, Dearman asserted that Bowers called him to the meeting to discuss expansion into the Meridian area. *Id.*

[17] *Id.* Dearman began working for Bowers on September 15, 1986. *Id.* One condition of Dearman's employment with Bowers was that he terminate his employment with McGinnis, with which Dearman complied. *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* Bowers asserted that the employment was terminable at will by either party. *Id.*

[21] *Id.*

The sales for this new venture were not satisfactory to Bowers.[22] In a November, 1986, meeting, Bowers proposed a sales quota for Dearman and a change in pay structure from a guaranteed base salary to a strict commission pay plan.[23] Finally, on November 18, 1986, Bowers terminated Dearman's employment.[24] Dearman filed a complaint against Bowers Window and Door Company seeking specific performance of an oral contract of employment, or, alternatively, damages for breach of that contract.[25] The chancellor held for Dearman, finding that the employment contract was for a definite term, September 15, 1986, through December, 1988.[26]

On appeal, Bowers argued that the lower court erred in holding that the oral employment contract was to extend through December, 1988, and that the court erred in applying the doctrine of equitable estoppel as an exception to the bar of the statute of frauds.[27]

The court first held that the chancellor did not err in determining that the contract was for a definite term.[28] The employment contract was insufficient under the statute of frauds because there was not a written confirmation of the length of employment.[29] The chancellor had held that the doctrine of equitable estoppel took the writing outside of the statute.[30] Bowers argued that the doctrine of equitable estoppel has never been held to be an exception to the statute of frauds in an employment contract.[31] The Mississippi Supreme Court held, however, that where the elements of equitable estoppel are present, the statute of frauds constitutes no bar to the enforcement of an agreement.[32] The elements of equitable estoppel are (1) that a party changed his position in reliance on the conduct of the other party, and (2) that he suffered a detriment as a result.[33] The court stated that

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[22] *Id.*

[23] *Id.* at 1312. There was conflicting testimony as to whether Dearman accepted this change in pay structure. *Id.*

[24] *Id.* Bowers' reason for the termination was lack of production. *Id.*

[25] *Id.* at 1310.

[26] *Id.* The chancellor granted specific performance of the remainder of the employment contract and $12,280 for past due salary. *Id.*

[27] *Id.*

[28] *Id.* at 1313. This ruling was a finding of fact made by the chancellor; the court stated that deference is to be given to such findings of the lower court unless they are manifestly wrong or clearly erroneous. *Id.* at 1312-13.

[29] *Id.* at 1313.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 1314; *see also*, PMZ Oil Co. v. Lucroy, 449 So. 2d 201, 206 (Miss. 1989)

although the first part of the estoppel test was satisfied,[34] the only detriment that Dearman might claim was the loss of existing employment in reliance on an offer of a more favorable employment.[35] The court held that "the termination of existing employment in reliance on an oral contract of employment, even for better pay, is only a necessary incident of being in the labor market and is not such an injury as to estop a defendant from asserting the statute of frauds as a defense."[36] Dearman had not shown any detriment sufficient to invoke an estoppel.[37] The chancellor had erred in finding that Dearman suffered sufficient detriment to invoke the doctrine of equitable estoppel.[38] Therefore, the Mississippi Supreme Court reversed the lower court's holding and rendered judgment for Bowers Window and Door Company.[39]

The Mississippi Supreme Court also decided an issue concerning the statute of frauds in *Crystal Springs Insurance Agency, Inc. v. Commercial Union Insurance Co.*[40] In 1983, Crystal Springs Insurance Agency and its agent Percy Burt Young were approached with the possibility of purchasing a local insurance agency that was failing.[41] The local insurance agency owed Commercial Union Insurance Company approximately $84,000.[42] Commercial Union transferred the accounts held by the local insurance company to Crystal Springs and Young in exchange for Crystal Springs' agreement to pay $80,000 for the accounts.[43] One year later, Commercial Union ended its agency relationship with Crystal Springs and Young.[44] Prior to this termination, Crys-

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(discussing elements of equitable estoppel).

[34] *Bowers Window & Door Co.*, 549 So. 2d at 1314. Dearman had changed his position of employment in reliance on the offers made by Bowers. *Id.*

[35] *Id.* at 1314-15.

[36] *Id.* at 1315. The court relied upon a New York case which stated, "[C]hange of job, even with increased emoluments and advance status is not sufficient to call promissory estoppel into play. The choice to forgo current employment because of rosy promises does not put the stigma of unconscionability upon the defendant's right to assert the statute of frauds." *Id.* (quoting Ginsberg v. Fairfield-Noble Corp., 81 A.D.2d 318, 321, 440 N.Y.S.2d 222 (1981)).

[37] *Id.* at 1315.

[38] *Id.* at 1316.

[39] *Id.* at 1315.

[40] No. 58585 (Miss. Nov. 29, 1989).

[41] *Crystal Springs Ins. Agency, Inc.*, No. 58585, slip op. at 1. The local insurance agency was General Insurance Agency. *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.* The termination was done pursuant to a provision in the agency contract. *Id.* Commercial Union stated that it was attempting to reduce its number of agents and agencies, especially those with deficient production. *Id.*

tal Springs had stopped making payments on the $80,000 promissory note owed Commercial Union.[45]

In July, 1985, Commercial Union filed suit against Crystal Springs and Young, seeking $47,000 in damages for the amount unpaid on the promissory note.[46] Crystal Springs and Young admitted the promissory note was unpaid but raised the affirmative defenses of lack of consideration, inadequate consideration, and fraudulent inducement to sign the promissory note.[47] Crystal Springs and Young filed a counterclaim seeking $50,000 in damages for fraudulent inducement.[48] Crystal Springs and Young alleged that "Commercial Union knew at the time of the agreement with Crystal Springs and Young that Commercial Union would terminate the agency relationship after execution of the note."[49] Commercial Union denied Crystal Springs' allegation. Commercial Union moved for summary judgment, which was granted.[50] Crystal Springs and Young appealed the lower court's decision and argued that the granting of summary judgment was error.[51]

The Mississippi Supreme Court stated that "mere general allegations which do not reveal detailed and precise facts will not prevent the award of summary judgment."[52] The court continued, explaining that when fraud is alleged the facts which would establish the fraud are normally known only by the party alleged to have committed the fraud.[53] Commercial Union argued that if it did promise to continue the agency relationship for a long period of time, that promise was unenforceable under the statute of frauds.[54] The court then cited *Walker v. U-Haul*[55] for the proposition that the statute of frauds would not bar a cause of action for fraud simply because the promise underlying

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[45] *Id.* at 1-2. Crystal Springs still owed $47,000 on the note. *Id.* at 2.

[46] *Id.* at 2.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* The court based its holding on House v. Holloway, 258 So. 2d 251 (Miss. 1972). *Crystal Springs Ins. Agency, Inc.*, No. 58585, slip op. at 2. In *House*, the court held that "[f]raud cannot be predicated upon statements which are promissory in their nature when made and which relate to future actions or conduct." *House*, 258 So. 2d at 253. A judgment of $47,000 was entered in favor of Commercial Union. *Crystal Springs Ins. Agency, Inc.*, No. 58585, slip op. at 3.

[51] *Crystal Springs Ins. Agency, Inc.*, No. 58585, slip op. at 1.

[52] *Id.* at 3.

[53] *Id.* A party may not be able to reveal "detailed precise facts in support of his claim" because intent, which is an element of fraud, "requires knowledge of the perpetrator's state of mind." *Id.*

[54] *Id.* at 3-4.

[55] 734 F.2d 1068 (5th Cir.), *on rehearing*, 747 F.2d 1011 (1984).

the fraud would be unenforceable under the statute.[56] Thus, if Young could prove that Commercial Union promised him that the agency relationship would continue for a long period of time and that it did so without any intention of keeping that promise, Young would be entitled to relief.[57] Therefore, the grant of summary judgment in favor of Commercial Union was error. Accordingly, the Mississippi Supreme Court reversed and remanded for further proceedings consistent with its opinion.[58]

B. Specific Performance

In *Osborne v. Bullins*,[59] the Mississippi Supreme Court held that specific performance is one remedy available to a seller in a land sales contract when the buyer breaches.[60] This holding resulted from the court's consideration of the following facts.

In 1986, Cassie Osborne, Jr., approached Willie Bullins about purchasing Bullins' property.[61] Osborne produced a contract which had been prepared by Osborne's brother, an attorney in Greenwood.[62] Bullins formally entered into a contract of sale with Osborne on September 6, 1986.[63] The contract set forth that Bullins agreed to sell and Osborne agreed to buy the property, its improvements, and fixtures, subject to certain terms and conditions.[64] The sale was to be closed within sixty days from delivery of a copy of the proposed deed and certificate of title to the purchaser.[65] At the time of closing, however, Osborne refused to close the deal.[66] Bullins filed suit against Osborne, seeking specific performance.[67] At trial, Osborne argued inability to obtain financing.[68] The chancery court granted Bullins specific performance and a remedy of a judgment of $85,000, with interest from that date, computed at the legal rate.[69] Bullins was directed to execute a

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[56] *Crystal Springs Ins. Agency, Inc.*, No. 58585, slip op. at 4.

[57] *Id.* at 5.

[58] *Id.*

[59] 549 So. 2d 1337 (Miss. 1989).

[60] *Osborne*, 549 So. 2d at 1340.

[61] *Id.* at 1338.

[62] *Id.*

[63] *Id.*

[64] *Id.* The purchase price was $85,000. *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 1338-39. At trial, Osborne showed that he was denied loans of $125,000 by two banks, but he had not tried to borrow $85,000 from anyone. *Id.*

[69] *Id.* at 1339.

warranty deed conveying the property to Osborne and to deposit the deed with the clerk of the court, to be released when Osborne paid the judgment.[70] Osborne appealed to the Mississippi Supreme Court, arguing that the court erred in its construction of the contract and in the remedy granted.[71]

The court first found that the clear language in the contract did not indicate that inability to secure financing would void the contract.[72] Then the court reasoned that specific performance is a "remedy for breach of contract which is not only a matter of right but of sound judicial discretion."[73] The court stated that the seller, as well as the buyer, might be granted a specific performance remedy in a land sales contract case.[74] The court further declared that the "traditional legal remedy would require Bullins to market the property to someone else and be limited to a judgment against Osborne of the difference, if any."[75] The court held that placing the burden of selling the property upon the seller would be unfair and inadequate in this type of situation.[76] Therefore, the remedy granted by the chancery court fit the facts of the case. Accordingly, the Mississippi Supreme Court affirmed the decree.[77]

C. *Lost Profits*

In *Kaiser Investments, Inc. v. Linn Agriprises, Inc.*,[78] the Mississippi Supreme Court faced the issue of whether to award lost profits damages for unplanted crops.[79] Kaiser Investments was involved in leasing land on a crop-share basis to Linn Agriprises.[80] Kaiser had leased the land to Linn in 1981 and 1982, but he decided not to continue leasing on a crop-share basis for 1983.[81] Kaiser informed Linn that he could lease the property for 1983, but he must acquire financ-

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[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* For extensive coverage of this reasoning, *see* Carter v. Hurst, 234 So. 2d 616, 620 (Miss. 1970); Roberts v. Spence, 209 So. 2d 623, 625 (Miss. 1968); Tansil v. Horlock, 204 So. 2d 457, 462 (Miss. 1967); Everett v. Hubbard, 25 So. 2d 768, 770 (Miss. 1946).

[74] *Osborne*, 549 So. 2d at 1340.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] 538 So. 2d 409 (Miss. 1989).

[79] *Kaiser Invs., Inc.*, 538 So. 2d at 414-16.

[80] *Id.* at 411.

[81] *Id.* Kaiser based this decision on the fact that Linn had lost money on its last two crops. *Id.*

ing elsewhere within ten days.[82] Linn was unable to secure the necessary financing.[83] Kaiser filed suit in the circuit court against Linn for the balance due on a note given by Linn to Kaiser in consideration for Kaiser's financing Linn's farming operations.[84] Linn counterclaimed for lost profits and other damages arising from Kaiser's alleged breach of an agreement to lease land to Linn and extend further crop financing.[85] The jury awarded $45,000 to Kaiser and $150,000 to Linn on his counterclaim.[86] Kaiser made a motion for additur of its verdict and remittitur of Linn's verdict, or in the alternative, a new trial.[87] The motion for additur was denied,[88] and the remittitur motion or a motion for a new trial was granted.[89] Kaiser declined the remittitur, opting for the new trial.[90] At the new trial, the jury awarded $156,000 to Linn.[91] Kaiser appealed to the Mississippi Supreme Court, arguing that lost profits for unplanted crops were too speculative and should not have been awarded.[92]

The Mississippi Supreme Court reversed and rendered judgment in the sum of $98,072.34 for Kaiser on its note, finding that Kaiser had clearly shown that Linn was indebted to him for that amount.[93] The court affirmed the lower court's decision on Linn's counterclaim, finding that Linn and Kaiser had entered a contract implied in fact to lease the farm and that Kaiser had breached that agreement.[94] The court reversed and remanded the lower court's award of lost profits to Linn, finding that these lost profits were not reasonably ascertainable from past experience.[95] The court noted that Linn was attempting to recover lost profits for crops not yet planted.[96] To recover lost profits

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[82] *Id.* Linn had already planted a wheat crop which had come to a stand on the property, but the new tenant disked it up. *Id.*

[83] *Id.*

[84] *Id.* at 410.

[85] *Id.*

[86] *Id.* at 411.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.* at 414.

[93] *Id.* at 413. The court stated that the evidence was clear and uncontroverted on this point. *Id.*

[94] *Id.* The court stated that there was clearly an intention by both parties to enter the lease and that the jury had resolved any conflicting testimony in Linn's favor. *Id.* at 413-14.

[95] *Id.* at 413-16.

[96] *Id.* at 414.

for unplanted crops, a plaintiff would be required to prove his damages with reasonable certainty and not merely on the basis of speculation and conjecture.[97] Therefore, Linn should not have been able to offer proof of lost profits for unplanted crops because Linn had not established itself as profitable.[98] It followed that Linn's lost profits for his unplanted crops were not "reasonably ascertainable based on past experience" and were not recoverable.[99] Accordingly, the court reversed and remanded the case for further action consistent with its opinion.[100]

II. Commercial Law

In *Huff v. Hobgood*,[101] the Mississippi Supreme Court addressed the issue of when a cause of action accrues for breach of the warranty of title.[102] Justice Pittman, writing for the court, stated that in order for a warranty for breach of a contract for the sale of goods to extend beyond six years after the date of delivery, the warranty must express or clearly state that it relates to future performance of the goods.[103]

Donald Huff purchased a used bulldozer from Royce Hobgood on or about December 12, 1978.[104] He received a bill of sale, which contained the following words: "The said property I guarantee is my own and free of all claims and offsets of any and all kinds."[105] In August, 1983, Huff sold the bulldozer to Michael Smith.[106] In January, 1986, Mississippi Highway patrol officers determined that the bulldozer had been stolen from Louisiana in March, 1973.[107] The insurance company that had insured the bulldozer for the previous owner took possession of it.[108] Smith purchased the bulldozer from the insurance company

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[97] *Id.* at 414-15.

[98] *Id.* at 415.

[99] *Id.* The court also held that on remand Linn would be entitled to show damages for lost profits on the 160 acres of wheat which had come to a stand. *Id.* at 416. Justice Dan Lee dissented, arguing that the damages awarded Kaiser were well within the evidence presented and that speculation and uncertainty of amount of damages were no bar to recovery for lost profits on Linn's counterclaim. *Id.* at 420-22.

[100] *Id.* at 416.

[101] 549 So. 2d 951 (Miss. 1989).

[102] *Huff*, 549 So. 2d at 953-55.

[103] *Id.* at 954-55 (citing Rutland v. Swift Chemical Co., 351 So. 2d 324, 325 (Miss. 1977)).

[104] *Id.* at 952. Huff paid $13,500 for the John Deere 450 Bulldozer. *Id.*

[105] *Id.*

[106] *Id.* Smith paid $10,000 for the bulldozer. *Id.*

[107] *Id.*

[108] *Id.*

and then demanded reimbursement from Huff.[109] Huff then paid Smith the amount demanded.[110] On August 19, 1986, Huff filed suit in circuit court, alleging that Hobgood had breached the warranty of title in selling the bulldozer and that Huff had suffered damages of $7,315.[111] Hobgood filed a motion to dismiss under Mississippi Rule of Civil Procedure 12(b)(6), which was expanded by the trial judge into a Rule 56 motion for summary judgment.[112] The trial court granted this motion and issued an order dismissing the complaint.[113] The court found that the cause of action would have accrued in December of 1978, when the bulldozer was tendered, and that the six-year statute of limitations would have run out in December, 1984.[114] Huff appealed to the Mississippi Supreme Court.[115]

On appeal, Huff argued that the trial court erred in holding that the statute of limitations had begun to run from the date of delivery.[116] First, the court noted that this transaction was a sale of goods governed by the Uniform Commercial Code (U.C.C.) as adopted in sections 75-2-101 to -725 of the Mississippi Code.[117] The court pointed out that the statute of limitations for breach of a contract for the sale of goods is six years after the cause of action has accrued.[118] The Mississippi Code provides that:

> A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered . . . .[119]

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[109] *Id.*

[110] *Id.*

[111] *Id.* at 952-53.

[112] *Id.* at 953.

[113] *Id.*

[114] *Id.* at 952-53. The court held that the six-year statute of limitations set forth in MISS. CODE ANN. § 75-2-725 (1972 & Supp. 1989) had run because the cause of action accrued when the breach occurred, which was at the time of delivery. *Huff*, 549 So. 2d at 953.

[115] *Huff*, 549 So. 2d at 953.

[116] *Id.*

[117] *Id.* at 953; *see also*, Taylor v. Ward, 393 So. 2d 1342, 1345-46 (Miss. 1981) (holding sale of bulldozer was governed by article two of U.C.C.).

[118] *Huff*, 549 So. 2d at 954 (citing MISS. CODE ANN. § 75-2-725 (1972 & Supp. 1989)).

[119] MISS. CODE ANN. § 75-2-725(2) (1972 & Supp. 1989).

Huff claimed the breach occurred when he discovered it in January of 1986.[120] The court then held that as a matter of law this cause of action accrued in December, 1978, when tender of delivery of the bulldozer was made to Huff, and that the six-year statute of limitations ran out in December, 1984.[121] Therefore, the grant of summary judgment under Mississippi Rule of Civil Procedure 56 was proper.[122] Accordingly, the judgment of the lower court was affirmed.[123]

III. Corporate Law

In 1989 the Mississippi Supreme Court addressed the issue of the fiduciary duty of a majority shareholder in a close corporation in *Fought v. Morris*.[124]

In 1974 Fought, Morris, Clayton A. Strong, and John S. Peyton organized Vicksburg Mold and Die, Inc.[125] They entered into a stock redemption agreement providing that, if a stockholder desired to sell his stock, he should first offer all of it to the company.[126] These shares acquired by the company should then be offered pro rata to the other stockholders.[127]

In 1979, Strong sold his stock to the corporation.[128] In accordance with the stock redemption agreement, the shares were divided equally among the stockholders.[129] In 1983, Peyton sold his shares,[130] but the

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[120] *Huff*, 549 So. 2d at 954.

[121] *Id.* at 955. The court relied on a 1977 Mississippi case which held: "The statute in unmistakable language states that in order for a warranty of this type to extend beyond six years after the date of tender of delivery, such warranty must *explicitly* relate to future performance of the goods. Explicit means something expressed or clearly stated and is more than merely implied." *Id.* at 954-55. (quoting Rutland v. Swift Chem. Co., 351 So. 2d 324, 325 (Miss. 1977)); *see also* Best Bearings, Inc. v. Challenger Parts Rebuilders, Inc., 10 Ill. App. 3d 404, 406, 294 N.E.2d 118, 120 (1973) (holding that breach of warranty of title accrued at time of purchase).

[122] *Huff*, 549 So. 2d at 955.

[123] *Id.*

[124] 543 So. 2d 167 (Miss. 1989).

[125] *Fought*, 543 So. 2d at 168. The company was to design and manufacture plastic and metal products. *Id.* Each of the four received 25 shares. *Id.* All four of the stockholders were employed by the company. *Id.* Morris was elected president, and Fought was elected vice-president. *Id.*

[126] *Id.* at 168-69.

[127] *Id.*

[126] *Id.* at 169.

[129] *Id.* Also, one share went to each of the stockholders' spouses. *Id.* By early 1982, the company's business had declined. *Id.* The shareholders stopped receiving wages from the company. *Id.* The shareholders were allowed to work elsewhere and still maintain their shareholder status. *Id.* After Peyton took a different job, Fought and Morris contin-

stock was not sold in accordance with the stock redemption agreement.[131] Peyton sold his stock to Morris for $4,000, transfer of an insurance policy, and release as guarantor from a bank note of the corporation.[132] Fought objected to this sale, making a counter-offer to purchase his pro rata share; however, Peyton rejected this counter-offer because Fought would not release him as guarantor from the bank note.[133] At trial, the chancellor concluded that:

> (1) There was no legal authority for finding a corporate officer guilty of breach of fiduciary duty for acquiring additional stock in an open scramble between stockholders; (2) there was no evidence that Morris possessed any knowledge unknown to Fought; Morris simply had the financial resources to obtain Peyton's release as personal guarantor on the bank note; and (3) there was no evidence to prove any corporate payment on the bank note which influenced the bank to release Peyton as a guarantor.[134]

Fought appealed to the Mississippi Supreme Court.[135]

On appeal, Fought argued that the lower court erred in failing to find a breach by Morris of the fiduciary relationship.[136] The Mississippi Supreme Court stated that "[p]ersons involved in a close corporation should act, therefore, at all times in good faith toward each other and to the corporation in order to maintain the confidence" in each other which is commonly lacking in a large or publicly held corporation.[137] The court held that "in a close corporation where a majority stockholder stands to benefit as a controlling stockholder, the majority's action must be 'intrinsically fair' to the minority interest."[138] The court

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ued working with the corporation. *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.* There was conflicting testimony showing that Fought might have suggested that Peyton sell. *Id.* Peyton attempted to sell the stock to one of Fought's neighbors, but that deal was not completed. *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.* at 168.

[136] *Id.*

[137] *Id.* at 171; *see* Donahue v. Rodd Electrotype, 367 Mass. 578, 328 N.E.2d 505, 515 (1975) (imposed "strict good faith standard" upon shareholders in close corporation); Hallahon v. Haltom Corp., 7 Mass. App. 68, 385 N.E.2d 1033, 1034 (1979) (same); Orchard v. Covelli, 590 F. Supp. 1548, 1556 (W.D. Pa. 1984), *aff'd*, 802 F.2d 448 (3d Cir. 1986) (majority shareholder's action must be "intrinsically fair" to minority interest).

[138] *Fought*, 543 So. 2d at 171.

further held that "Morris' intended exclusion of Fought from the purchase of Peyton's shares was a breach of the Stock Redemption Agreement and bylaws and therefore a breach of his fiduciary duty as an officer, a director, and a stockholder under the good faith standard" adopted.[139] Thus the Mississippi Supreme Court reversed the lower court's holding and remanded the case for further proceedings consistent with its opinion.[140]

IV. Banks and Banking: Usury

In *Denley v. Peoples Bank*,[141] Larry Denley and his wife borrowed money from the Peoples Bank of Indianola.[142] The promissory note, secured by a deed of trust on a home, provided for a precomputed finance charge of $9,796.22, and the Denleys signed the precomputed note for $23,803.72.[143] The note provided for fifty-nine monthly payments of $230 and a final balloon payment of $10,233.72.[144] A clause in the note provided for prepayment, but the finance charge would be recalculated using the rule of 78's to determine the amount then due.[145] The Denleys prepaid the debt after sixteen months.[146] They had made payments totaling $3,220 and a payoff balance of $15,302.53, plus late charges of $18.40,[147] amounting to a total sum of $18,522.53.[148] The bank computed the payoff by using the rule of 78's.[149] The Denleys then filed suit against the bank, contending that the bank's method of computing interest was usurious when satisfied,

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[139] *Id.* at 172. After the stock transfer, Fought was fired as an officer and employee. *Id.* at 173. He resigned his appointment to the Board of Directors. *Id.* The corporation was purchased, through dissolution, by a new corporation owned by Morris. *Id.* The Foughts claimed that they were not accurately compensated for their shares upon dissolution. *Id.* The court held that Morris proceeded inappropriately in valuing Fought's stock and remanded to the lower court to make a determination of the stock's fair market value. *Id.* The court also stated that the lower court on remand would have the authority to award punitive damages at its discretion. *Id.*

[140] *Id.* at 174.

[141] 553 So. 2d 494 (Miss. 1989)

[142] *Denley*, 553 So. 2d at 494.

[143] *Id.* This loan was made at an annual percentage rate of 16%. *Id.* The balance of the precomputed note included $14,007.50 principal and $9,746.22 interest. *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.* at 495.

[148] *Id.*

[149] *Id.*

and they sought the penalties provided by the usury law.[150] The lower court granted summary judgment in favor of the bank.[151] The Denleys appealed to the Mississippi Supreme Court.[152]

The Mississippi Supreme Court reversed and rendered judgment for the Denleys, finding that the amount received by the bank exceeded the statutorily allowable amounts.[153] The rate on the note was precomputed to give the bank a yield of 16%.[154] The legal limit at the time the note was signed was 18.43%.[155] By computing the payoff amount using the rule of 78's, the bank received a yield of 23.86% of the amount borrowed.[156] The loan on its face was legal, but upon prepayment the yield must be recomputed.[157] The bank should have recalculated the interest earned over the term during which the Denleys had use of the borrowed money according to the actuarial method, as required in section 75-17-1(4) of the Mississippi Code.[158] Therefore, the bank, by using the Rule of 78's for calculation of interest upon prepayment, had exceeded the specified legal rate of yield.[159] Accordingly, the Mississippi Supreme Court reversed the lower court's judgment, rendered judgment for the Denleys, and remanded the case to the circuit court for further proceedings consistent with its opinion.[160]

Richard Kent

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[150] *Id.* at 494.

[151] *Id.*

[152] *Id.*

[153] *Id* at 497.

[154] *Id.* at 495.

[155] *Id.*

[156] *Id.* at 497.

[157] *Id.*

[158] *Id.* MISS. CODE ANN. § 75-17-1(4) (Supp. 1989) limits banks to a specified "yield calculated according to the actuarial method." *Id.*

[159] *Denley*, 553 So. 2d at 497.

[160] *Id.* Peoples Bank petitioned the court for rehearing, but the Mississippi Supreme Court denied its petition for rehearing. *Id.* Justice Robertson, concurring in denial of the petition for rehearing, stated that the key to this case was statutory interpretation. *Id.* at 499. The statute provides, "If a greater finance charge than that authorized by applicable law shall be stipulated for or received in any case, all interest and finance charge shall be forfeited, and may be recovered back, whether the contract be executed or executory." MISS CODE ANN. § 75-17-25 (Supp. 1989). Therefore, "a credit would be rendered usurious *either* by the creditor's contracting (i.e., stipulating) for a usurious rate *or* actually receiving usurious interest." *Denley*, 553 So. 2d at 500. Justice Robertson concluded by stating that the opinion only condemns the use of the rule upon prepayment in that "*small number of cases where there is a contractual right of prepayment without penalty and where prepayment is sufficiently early in the life of the credit that the operation of the rule in fact results in the collection of a usurious yield.*" *Id.* at 504. In a

concurring opinion, Justice Blass expressed surprise and distress at the amici's vigorous, rude, condescending, and mistaken attack upon the court. *Id.* (Blass, J., concurring). In concluding, he stated, "Had they not been 'friends of the court,' the language could well have been thought to be offensive." *Id.* at 504-05.

CRIMINAL LAW

Introduction

In 1989, the Mississippi Supreme Court rendered decisions in criminal cases in the following areas: constitutional law,[1] evidence,[2] jury instructions,[3] voir dire,[4] sentencing,[5] statutory construction,[6] degree of proof,[7] discovery,[8] insanity,[9] verdicts,[10] prosecutorial misconduct,[11] and miscellaneous issues,[12] including the propriety of multiple count indictments.[13]

I. Constitutional Law

A. Fourth Amendment[14]

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[1] *See infra* notes 14-131 and accompanying text.
[2] *See infra* notes 132-232 and accompanying text.
[3] *See infra* notes 233-73 and accompanying text.
[4] *See infra* notes 274-300 and accompanying text.
[5] *See infra* notes 301-34 and accompanying text.
[6] *See infra* notes 335-59 and accompanying text.
[7] *See infra* notes 360-65 and accompanying text.
[8] *See infra* notes 366-75 and accompanying text.
[9] *See infra* notes 376-84 and accompanying text.
[10] *See infra* notes 385-99 and accompanying text.
[11] *See infra* notes 400-02 and accompanying text.
[12] *See infra* notes 403-425 and accompanying text.
[13] *See infra* notes 409-25 and accompanying text.
[14] The fourth amendment of the United States Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. Article 3, section 23 of the Mississippi Constitution provides: "The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search . . . ." Miss. Const. art. 3, § 23.

In 1989 the Mississippi Supreme Court decided the following cases, which also dealt with fourth amendment search and seizure issues: Shell v. State, 554 So. 2d 887, 895-96 (Miss. 1989) (seizure of defendant's tennis shoes without warrant was lawful); Nathan v. State, 552 So. 2d 99, 102-04 (Miss. 1989) (investigative or "*Terry*" stop requires only reasonable suspicion on part of police officer); Stokes v. State, 548 So. 2d 118, 122-23 (Miss. 1989) (consent by defendant's mother to search defendant's room in mother's house was valid as there was common authority, mutual use, and joint control over area, and defendant did not have reasonable privacy expectation as to room); Burnside v. State, 544 So. 2d 1352, 1355 (Miss. 1988) (defendant's fourth amendment right not violated by introduction of test results of male rape kit where defendant voluntarily signed waiver giving hospital permission to prepare such kit), *modified on den. pet. reh'g* (1989).

In 1989, the Mississippi Supreme Court rendered two decisions[15] which dealt primarily with the consequences to a defendant of a third party's consent to a search of premises controlled by that party. In *Waldrop v. State*,[16] the defendant was arrested on a parole violation.[17] While searching for the defendant on the day of the arrest, the police smelled a terrible odor which was similar to that of ether, a substance used in making methamphetamine,[18] emanating from a mobile home that was a few hundred yards from the arrest scene.[19] Following his arrest, the defendant claimed that the mobile home belonged to a female acquaintance.[20] Thereafter, the police picked up the woman who consented in writing to a search of the mobile home.[21] When the police

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[15] In Turner v. State, No. 03-82 (Miss. Nov. 22, 1989), a case which is not discussed in the text, the court rejected all 22 of the defendant's assignments of error, including his claim that evidence found during a search of his cousin's home was illegally obtained even though the cousin consented to the search. No. 03-82, slip op. at 10, 32. The court held that where a third party voluntarily consents to a search of his own home, a defendant who has no reasonable expectation of privacy in those premises, in that he does not exercise exclusive possession or control of the premises, is not a tenant, and does not pay rent, has not suffered a violation of his fourth amendment right, and the search is legal. *Id.* at 9-10 (citing Rakas v. Illinois, 439 U.S. 128, 134 (1978)); *see* Depreo v. State, 407 So. 2d 102, 107-08 (Miss. 1981) (defendant lacked standing to object to search of father's home under *Rakas* requirements).

As of this writing, the two cases treated in notes 15-35 and accompanying text are subject to revision or withdrawal.

[16] No. 58,483 (Miss. May 17, 1989).

[17] *Waldrop*, No. 58,483, slip op. at 2. This case was originally before the court in Waldrop v. State, 506 So. 2d 273 (Miss. 1987). *Waldrop*, No. 58,483 slip op. at 1. There, the court reversed the conviction of the defendant, Ray M. Waldrop, a/k/a David Ray Walters, for the manufacture of methamphetamine because of ineffective assistance of counsel. *Id.* at 1 (citing *Waldrop*, 506 So. 2d at 276). Waldrop was arrested by the Leake County sheriff and four state investigators on a parole violation after the receipt of a teletype from the National Criminal Information Center. *Id.* at 2. Police also had information that Waldrop was running a drug laboratory and that he knew Mary Lube, who lived in the area. *Id.*

[18] Methamphetamine is a Schedule II drug under MISS. CODE ANN. § 41-29-115 (Supp. 1989). A Schedule II drug is a controlled substance the possession of which is a felony. MISS. CODE ANN. § 41-29-139(c) (Supp. 1989).

[19] *Waldrop*, No. 58,483, slip op. at 2. Lube's car had previously been seen parked in front of the mobile home. *Id.* Police had received reports that Waldrop had lived in the mobile home before it was moved from Louisiana to Mississippi. *Id.* Besides the suspicious odor, police noticed that all of the windows of the home were covered with aluminum foil and that no water or electric lines ran from the trailer. *Id.*

[20] *Id.* Even though he had the keys, Waldrop contended that the home belonged to Mary Lube. *Id.*

[21] *Id.* Although the police claimed that Lube was not under arrest, they transported her in a patrol car to the sheriff's office and gave her the *Miranda* warnings. *Id.* at 2-3. Lube was later arrested and jailed overnight, but was never indicted or prosecuted for

searched the home, they discovered various pieces of laboratory equipment and five doughy balls containing methamphetamine, which had been recently manufactured.[22] The defendant admitted having recently been in the trailer but denied that the lab equipment or the odor was present at that time.[23] On the ground approximately twenty feet from the mobile home, the police found a gray powdery substance visible to the naked eye, which was identified as a by-product of manufacturing methamphetamine.[24] The defendant was subsequently convicted of the manufacture of methamphetamine and sentenced to thirty years imprisonment without parole, suspension, or reduction.[25]

The Mississippi Supreme Court found that because fourth amendment rights are personal and may not be asserted vicariously,[26] the defendant lacked standing to challenge the validity of his acquaintance's consent to search her trailer.[27] Since he denied owning the mobile home, the defendant had no standing to complain later that the search was unlawful.[28] The court stated that even if the defendant possessed standing to litigate this issue, his argument was moot because the woman, as owner of the trailer, possessed sufficient authority to consent to the search.[29]

The court further held that the defendant lacked standing to challenge the presence of the police on the land where the trailer was

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any role in Waldrop's crimes. *Id.* at 4.

[22] *Id.* at 3. The methamphetamine had been manufactured within the last 24 hours. *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* at 5 (citing Rakas v. Illinois, 439 U.S. 128 (1978)); *see also* Ware v. State, 410 So. 2d 1330, 1331-32 (Miss. 1982) (defendant lacked standing to challenge search of car in which he was passenger).

[27] *Waldrop*, No. 58,483, slip op. at 6-7. The court also found that Waldrop lacked standing to question Lube's arrest. *Id.* at 4-5. The court stated that only Lube herself had standing to litigate the validity of her arrest. *Id.* at 5. The court continued, opining that there was sufficient proof that at the time she consented to the search, Lube was not under arrest or in custody. *Id.*

[28] *Id.* at 6; *see* Watkins v. State, 262 So. 2d 422, 423-24 (Miss. 1972) (defendants who denied owning automobile lacked standing to challenge its search); Ball v. State, 194 So. 2d 502, 503 (Miss. 1967) ("One testifying that property searched did not belong to him may not thereafter complain that the search was unlawful") (quoting Ross v. State, 140 Miss. 367, 105 So. 846 (1925)).

[28] *Waldrop*, No. 58,483, slip op. at 6; *see* Shaw v. State, 476 So. 2d 22, 23-24 (Miss. 1985) (consent of driver, who had lawful possession of car, "sufficient to validate the search"); Loper v. State, 330 So. 2d 265, 267 (Miss. 1967) (valid consent to search given by person with common authority over premises) (quoting United States v. Matlock, 415 U.S. 164 (1974)).

parked.[30] The court noted that even if the defendant possessed standing to litigate this issue, this assignment of error would fail since police have the right to enter private property, especially where the owner has given her consent to search.[31]

Finally, the court held that the powdery substance found near the trailer fell under the plain view doctrine.[32] The court stated that once the woman consented to the search, the police could legally seize any evidence found in plain view.[33] Because the woman's consent to search was valid and the police were legally on the property, the court found the police to be justified in seizing the powdery substance, which was clearly visible from the trailer.[34] Finding no merit in any of the defendant's arguments, the court affirmed.[35]

B. Fifth Amendment[36]

During 1989, the Mississippi Supreme Court rendered three deci-

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[30] *Waldrop*, No. 58,483, slip op. at 7-8. The court noted that Lube was in possession of a deed conveying from the grantor, George Busby, to the grantee, Ray Waldrop, the property on which the trailer was located. *Id.* at 7. The deed was executed approximately two weeks before Waldrop's arrest but was not recorded until two months later. *Id.* The court held that since no delivery of the deed had been effectuated, and since Waldrop had not accepted the deed, no title to the land passed to him. *Id.* (citing Mississippi State Highway Comm'n v. Sanders, 269 So. 2d 350, 351 (Miss. 1972); Carothers v. Carothers, 227 Miss. 659, 662, 86 So. 2d 855, 856 (1956)).

[31] *Id.* at 7-8 (citing 1 W. LAFAVE, SEARCH AND SEIZURE § 2.3, at 318, 323 (1978)); *see also* United States v. Clancy, 285 F. Supp. 98, 99 (S.D. Miss. 1968) (protections of fourth amendment not extended to open fields); People v. Houze, 387 N.W.2d 807, 811 n.1 (Mich. 1986) (courts have upheld as nonintrusive, police searches of areas open to public common use).

[32] *Waldrop*, No. 58,483, slip op. at 8-9 (citing Coolidge v. New Hampshire, 403 U.S. 443, 464-73 (1971)).

[33] *Id.* at 9. The court noted that it had previously held that a valid consent to search is an exception to the requirement of a warrant. *Id.*; *see* Whittington v. State, 523 So. 2d 966, 973 (Miss. 1988) (permission to search car freely and voluntarily given); Hudson v. State, 475 So. 2d 156, 157-58 (Miss. 1985) (women with whom defendant lived gave valid consent to search defendant's apartment); Jackson v. State, 418 So. 2d 827, 830 (Miss. 1982) (consent to search car trunk valid).

[34] *Waldrop*, No. 58,483, slip op. at 9.

[35] *Id.*

[36] The fifth amendment to the United Sates Constitution states: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. V. The Mississippi Constitution provides: "No person's life or liberty shall be twice placed in jeopardy for the same offense . . . ." MISS. CONST. art. 3, § 22. Furthermore, article 3, section 14 requires that "[n]o person shall be deprived of life, liberty, or property except by due process of law." MISS. CONST. art. 3, § 14.

sions specifically involving claims of double jeopardy, two of which will be treated textually.[37] In *Griffin v. State*,[38] the defendant, Willie Griffin, was indicted for jury tampering and conspiracy to jury tamper.[39] On the jury tampering charge, the jury was instructed that the crime was obstruction of justice by an attempt to tamper with a juror and that it could convict Griffin if it found he did " '*any* act which is an element of the crime, or *immediately connected with it, or leading to its commission* . . . .' "[40] Griffin was subsequently acquitted of jury tampering.[41]

Before his trial on the conspiracy charge, Griffin filed a motion to dismiss on the grounds of double jeopardy and collateral estoppel.[42] At the hearing on the double jeopardy motion, it was stipulated that, excepting the testimony of one witness, the evidence against Griffin on the conspiracy charge was the same as that on the jury tampering charge.[43] Also, the state conceded that it would offer essentially the same evidence in the conspiracy case as it had in the tampering case.[44] In overruling Griffin's motion to dismiss, the trial court held that, although the evidence and facts in both cases were fundamentally the same, the elements of the two crimes were different and thus consti-

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[37] In Norman v. State, 543 So. 2d 1163 (Miss. 1989), the Mississippi Supreme Court held that where convictions for rape and burglary arise out of the same occurrence, there is no violation of the double jeopardy clause of either the state or federal constitution. *Id.* at 1164. The court found Smith v. State, 429 So. 2d 252 (Miss. 1983) dispositive of the defendant's allegation of double jeopardy. *Norman*, 543 So. 2d at 1164.

[38] 545 So. 2d 729 (Miss. 1989).

[39] *Griffin*, 545 So. 2d at 730. The indictments arose from an incident involving a prospective juror in a pending criminal proceeding against Griffin's brother, Melvin Griffin, whose trial was set to begin on May 27, 1985, in the Circuit Court of Bolivar County. *Id.* at 731. The day before the trial was to start, Melvin and Griffin went to the home of the mayor of Winstonville, Mississippi, Milton Tutwiler. *Id.* Melvin, who had a venire list, asked Tutwiler if he knew anyone on the list. *Id.* When Tutwiler acknowledged that he knew one of the potential jurors, Melvin asked him to tell the juror that the brothers " 'had been by her house' " and to ask her to " 'remember him, because the D.A. was trying to try him as a habitual criminal.' " *Id.* During this meeting between Melvin and Tutwiler, Griffin sat near Melvin, watching television. *Id.*

[40] *Id.* at 733.

[41] *Id.* at 731, 733. The state sought to prove that Griffin jury tampered by showing that he was present when his brother tried to elicit Mayor Tutwiler's help in influencing the prospective juror and that he and Melvin had gone by the juror's house on their way to the mayor's. *Id.* at 733.

[42] *Id.* at 731. In his motion, Griffin argued that the acquittal on the jury tampering charge constituted a double jeopardy bar to the conspiracy charge. *Id.*

[43] *Id.* When the witness, Mayor Tutwiler, testified, he divulged no additional information. *Id.*

[44] *Id.*

tuted separate crimes that did not merge into each other.[45]

On interlocutory appeal,[46] Griffin alleged that the trial court erred in refusing to grant his motion to dismiss based on double jeopardy,[47] arguing that an acquittal for jury tampering presented a double jeopardy bar to a prosecution for conspiracy to jury tamper based on the same facts and evidence.[48]

The Mississippi Supreme Court reversed and rendered, quashing the conspiracy indictment and discharging Griffin.[49] The court held that where there is a common nucleus of operative facts existing in indictments for a substantive offense and a conspiracy charge, and where the ultimate facts have been determined in a prior acquittal by a final judgment, a conspiracy trial is barred thereafter under double jeopardy.[50] The court based its decision on the "rational jury" test which states that a court must examine the record of the prior proceeding to determine whether " 'a rational jury could have grounded its verdict upon an issue *other* than that which the defendant seeks to foreclose from consideration.' "[51] The court concluded that the evidence in the jury tampering charge suggested that at most Griffin acted as an accessory and thus the only rational explanation for the

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[45] *Id.*

[46] *Id.* The trial court granted the interlocutory appeal and stay of trial on Griffin's waiver of the 270-day speedy trial statute. *Id.* The Mississippi Supreme Court stated that under MISS. SUP. CT. R. 5(a), an interlocutory appeal may be granted on a question of law in limited circumstances and that although interlocutory appeals are not usually permitted in criminal cases, the court had precedent for allowing the interlocutory appeal in the case at bar. *Id.* at 731-32; *see, e.g.*, Abney v. United Sates, 431 U.S. 651, 656-62 (1977) (pretrial order denying defendants' motion to dismiss indictment on double jeopardy grounds immediately appealable); State v. Caldwell, 492 So. 2d 575, 577 (Miss. 1986) (immediate procedural availability of remedial writ proper to promote judicial efficiency and economy); Harden v. State, 460 So. 2d 1194, 1200-01 (Miss. 1984) (supreme court obligated to interfere in trial proceedings where presented with double jeopardy claim in habeas corpus petition); *see also In re* W.R.A., 481 So. 2d 280, 283 (Miss. 1985) (speedy trial rule interpreted). The court addressed the merits of Griffin's allegations of double jeopardy on interlocutory appeal because of the substantial injury involved and in the interests of judicial economy and efficiency. *Griffin*, 545 So. 2d at 733.

[47] *Griffin*, 545 So. 2d at 730. Griffin also raised collateral estoppel as a basis for the lower court's error, but the court determined that because collateral estoppel does not operate in criminal cases, its decision would be based solely on Griffin's double jeopardy claim. *Id.* at 733 n.1 (quoting Sanders v. State, 429 So. 2d 245, 251 (Miss. 1983)). The court stated, however, that regardless of whether its decision was cast in terms of collateral estoppel or double jeopardy, the analysis was the same. *Id.*

[48] *Id.* at 730.

[49] *Id.* at 734.

[50] *Id.* at 730, 734.

[51] *Id.* at 734 (quoting Ashe v. Swenson, 397 U.S. 436, 444 (1970)).

jury's acquittal of Griffin was that the jury was unable to find enough proof that Griffin "did any act connected with or leading to the crime of attempting to influence [the] juror . . . sufficient to make him an accessory."[52] Consequently, any evidence which might suggest that Griffin was a conspirator would mandate concluding that he was an accessory.[53] Since he had been acquitted of jury tampering, the court found that he could not be prosecuted for conspiracy to jury tamper and that by pursuing the prosecution for conspiracy, the state was seeking to convict Griffin of the same conduct for which he had already been acquitted.[54]

In *Wright v. State*,[55] the defendants, Joe Wright and Johnny Wright, were indicted for and convicted of burglary of an inhabited dwelling in connection with three entries into the home of an elderly woman.[56] On appeal, Joe Wright argued[57] that the second count of the multi-count indictment[58] constituted double jeopardy as to him.[59] Re-

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[52] *Id.* (citing MISS. CODE ANN. § 97-1-3 (1972)).

[53] *Id.* (citing Peoples v. State, 501 So. 2d 424, 429 (Miss. 1987); Malone v. State, 486 So. 2d 360, 363 (Miss. 1986)).

[54] *Id.*

[55] 540 So. 2d 1 (Miss. 1989).

[56] *Wright*, 540 So. 2d at 2. Joe Wright and Johnny Wright were tried and convicted in the Circuit Court of Bolivar County. *Id.* Joe Wright was sentenced to serve two 12-year terms to run concurrently, and Johnny Wright was sentenced to one 12-year term. *Id.* The convictions arose out of three entries into the home of Ethel Mae Washington during the early morning hours of August 28, 1986. *Id.* at 2-3. Jerry Cleveland, the Wrights' half-brother, and Willie Beatie accomplished the first burglary. *Id.* at 3-4. Cleveland and Joe Wright went back the second time. *Id.* at 3-5. On the third occasion, they were joined by Johnny Wright. *Id.* at 3, 5. The Wright brothers were convicted because of the incriminating testimony of Cleveland and because stolen items were found in the Wrights' possession. *Id.* at 3-5.

[57] *Id.* at 4. Together, the Wrights also argued that the jury verdict was against the overwhelming weight of the evidence and that the trial court erred in refusing to grant a motion for mistrial when Cleveland testified that he had been threatened by the Wrights. *Id.* at 3-4. As to the first assignment of error, the Mississippi Supreme Court found that as the Wrights had made no motion for a directed verdict at the close of the state's evidence, instead proceeding with their evidence, any objection to the sufficiency of the evidence was waived. *Id.* at 4 (quoting Harris v. State, 413 So. 2d 1016, 1018 (Miss. 1982)). As to the second assignment, the court noted that the prosecutor did attempt to question Cleveland about what might happen to him in prison as a result of his testimony for the State. *Id.* However, the court found that since the trial court stopped the prosecutor's questioning and instructed the jury to disregard the testimony, the assignment was without merit. *Id.* (citing Wetz v. State, 503 So. 2d 803, 810 (Miss. 1987); May v. State, 460 So. 2d 778, 783 (Miss. 1984); Herron v. State, 287 So. 2d 759, 766 (Miss. 1974)).

[58] *Id.* The Bolivar County Grand Jury returned a multi-count indictment against Cleveland and the Wrights, with Joe Wright being charged in both counts of the indict-

jecting his argument that his two entries into the woman's house constituted one continuous crime,[60] the Mississippi Supreme Court held that, although committed in close proximity of time to one another, separate acts may constitute separate criminal offenses, thus precluding an assignment of error based on double jeopardy.[61] The court noted that the crime of burglary is complete upon a showing of two elements: "(1) the burglarious breaking and entering of a dwelling, and (2) the intent to commit a crime therein."[62] The court reasoned that although the entries into the house occurred close in time to one another and involved the same victim, "there was a clear beginning and end to each of the . . . intrusions into the house."[63] Finding that Joe Wright made two of the three burglarious entries into the dwelling,[64] the court stated that, while double jeopardy protects criminal defendants from exposure to more than one prosecution for the same offense, it does not protect the defendant against different prosecutions for different offenses.[65]

In another fifth amendment case, *Powell v. State*,[66] the court considered whether the truthfulness of a confession can be considered in determining the voluntariness of that confession. In *Powell*, the defendant was convicted of armed robbery and sentenced as a habitual offender.[67] The conviction involved a service station robbery in which a

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ment with two separate burglaries of Washington's home. *Id.*

[59] *Id.*

[60] *Id.* at 5. The court considered Joe Wright's double jeopardy claim even though he did not attack the indictment at trial and therefore should have been procedurally barred from assigning this error on appeal. *Id.* at 4 (citing Smith v. State, 445 So. 2d 227, 229 (Miss. 1984)).

[61] *Id.* at 5 (discussing Pharr v. State, 465 So. 2d 294 (Miss. 1984)).

[62] *Id.* at 4; *see* Jackson v. State, 483 So. 2d 1353, 1354 (Miss. 1986) (stating two elements necessary to convict defendant of burglary).

[63] *Wright*, 540 So. 2d at 5. The court determined that the burglaries were complete upon the entrance into Washington's home and the commission of larceny once inside the house. *Id.*

[64] *Id.*

[65] *Id.* (citing Hughes v. State, 401 So. 2d 1100 (Miss. 1981)). The Mississippi Supreme Court decided the following cases in 1989 which also dealt with the double jeopardy issue: Hoover v. State, 552 So. 2d 834, 837-38 (Miss. 1989) (allowing trial judge to conduct guilt and sentencing trial for capital murder and separate recidivist hearing for sentencing did not constitute double jeopardy); Mitchell v. State, 539 So. 2d 1366, 1368-69 (Miss. 1989) (where mistrial is not result of deliberate error by state, retrial does not constitute double jeopardy).

[66] 540 So. 2d 13 (Miss. 1989).

[67] *Powell*, 540 So. 2d at 13. As an habitual offender, Edgar Powell, Jr., was sentenced to 40 years imprisonment without eligibility for parole.

gun was stolen.[68] During an interview concerning another robbery, the defendant, an informant for a Hattiesburg police detective,[69] produced the handgun stolen in the service station robbery.[70] A few days later, after the gun was identified as the one taken in the robbery, the defendant voluntarily accompanied the detective to the police station to discuss the gun.[71] The detective contended that during the interrogation at the station, the defendant admitted robbing the service station and freely signed a waiver of rights form.[72] The defendant argued that he never told the detective any of the information that was included by the detective in the typed confession.[73]

On appeal, the defendant argued that at the suppression hearing, the trial court impermissibly allowed the prosecution to question him regarding the truthfulness of his confession.[74] The court held that where a criminal defendant challenges the voluntariness of a confession, he has a due process right to a reliable determination that the confession was in fact voluntarily given without being subjected to questions as to its truthfulness.[75] However, the court found that once

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[68] *Id.* The robbery occurred in Hattiesburg on January 31, 1986. *Id.* Besides the gun, $150 in cash was also taken. *Id.* Following the robbery, the employee, Charles Murphy, could only identify the man as being black and having beads in his hair. *Id.* at 13. After suffering two subsequent strokes, Murphy was unable to make any identification at all of the robber. *Id.* at 14.

[69] *Id.* For approximately one month in early 1986, Powell, who was given the code name "B-1," was an official informant for Detective Larry Brinkley. *Id.* Powell was to discover and relay information concerning a local fencing operation. *Id.*

[70] *Id.* Brinkley maintained that Powell originally told him that he found the gun. *Id.*

[71] *Id.*

[72] *Id.* Detective Brinkley maintained that once he and Powell were alone, he read Powell his *Miranda* rights; Powell disputed that he received his rights at that time. *Id.* Powell eventually told Brinkley that he did not find the gun in question, but instead had bought it. *Id.* Brinkley stated that the confession and execution of the waiver were made by Powell after further questioning and another *Miranda* warning. *Id.*

[73] *Id.* Powell, who had a sixth grade education, maintained that he could not read or write anything other than his name. *Id.* He claimed that the statement was not read to him and that he thought it was a copy of his confession concerning the purchase of the gun. *Id.* at 14-15.

[74] *Id.* at 15. Powell also argued that he confessed in the hope of future leniency. *Id.* at 16.

[75] *Id.* at 15-16 (citing Lego v. Twomey, 404 U.S. 477, 489 (1972); Jackson v. Denno, 378 U.S. 368, 377 (1964); Rogers v. Richmond, 365 U.S. 534, 544 (1961); Doby v. South Carolina Dep't of Corrections, 741 F.2d 76, 78 (4th Cir. 1984); Gavin v. State, 473 So. 2d 952, 954 (Miss. 1985); Rhone v. State, 254 So. 2d 750, 753, 754 (Miss. 1971)). The court noted that there was "extensive and impermissible cross-examination" at the suppression hearing regarding the veracity of Powell's statement to Brinkley; nevertheless, such error did not warrant reversal. *Id.*

the confession was before the jury, cross-examination on the credibility of the confession became a key jury question.[76] Because the trial court made extensive findings of fact which were supported by substantial evidence, made no reference to the veracity of the statement, and were not clearly erroneous,[77] the court concluded that it had no authority to overturn the trial court's findings of fact regarding the voluntariness of the confession.[78]

C. *Sixth Amendment*[79]

The Mississippi Supreme Court decided several cases in 1989 based primarily on the sixth amendment right to counsel,[80] right to

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[76] *Id.* at 16.

[77] *Id.* at 16-17. The trial court concluded that Powell had received his *Miranda* rights and had "knowingly and voluntarily waived his right to remain silent and confessed." *Id.* at 15, 15-16 n.1.

[78] *Id.* at 16-17 (citing United States v. Kreczmer, 636 F.2d 108, 110 (5th Cir. 1981); Neal v. State, 451 So. 2d 743, 753 (Miss. 1984)). The Mississippi Supreme Court decided the following cases in 1989 which also dealt with the fifth amendment: Turner v. State, No. 03-82, slip op. at 21-22 (Miss. Nov. 22, 1989) (because defendant had already been convicted, there was no constitutional or statutory violation where, at sentencing phase, prosecutor commented on defendant's failure to testify at trial); Ford v. State, 555 So. 2d 691, 697 (Miss. 1989) (MISS. UNIF. CRIM. R. CIR. CT. P. 1.03, which states that "*Miranda* warnings should be given prior to subsequent interrogation session with the person in custody," is not applicable where there is only one interrogation session); McCarty v. State, 554 So. 2d 909, 912-13 (Miss. 1989) (where defendant was under arrest during multiple questionings and was not informed of his *Miranda* rights, defendant was not properly warned of his rights and any statements made should have been excluded by trial judge); Fleming v. State, 553 So. 2d 505, 507-08 (Miss. 1989) (requirement that defendant demonstrate sufficient need to entitle him to free copy of transcripts did not violate due process or equal protection rights); Nathan v. State, 552 So. 2d 99, 103 (Miss. 1989) (when interrogation is investigatory, non-custodial, or on-the-scene, *Miranda* warnings do not have to be given); Stringer v. State, 548 So. 2d 125, 129-32 (Miss. 1989) (witness who had been convicted of perjury was properly allowed to assert claimed protection of fifth amendment).

[79] The United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The Mississippi Constitution also provides for the right to a speedy and public trial. MISS. CONST. art. 3, § 26.

[80] In Burnside v. State, 544 So. 2d 1352 (Miss. 1988), *modified on reh'g* (1989), the defendant was given the *Miranda* warnings and then signed a waiver of his constitutional rights, specifically the right to counsel "at this time," before proceeding to make an oral statement to the police. *Id.* at 1354. In reversing and remanding the defendant's conviction for rape, the court found that since the State failed to meet its burden of proof to overcome the defendant's testimony that he requested an attorney during the police interrogation, the oral statement made by the defendant without benefit of counsel violated the sixth amendment. *Id.* at 1354-55; *see also* Magee v. State, 542 So. 2d 228,

effective assistance of counsel,[81] and right to a speedy trial.[82]

The Mississippi Supreme Court rendered two decisions specifically dealing with a defendant's right to a speedy trial,[83] only one of which will be treated textually.[84] In *Trotter v. State*,[85] the defendant pled

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233 (Miss. 1989) (while defendant has right to counsel during lineup after initiation of proceedings adversarial, if no identification is made and subsequent in-court indentification is not impermissibly tainted by lineup, failure to have attorney present becomes harmless error).

[81] In Leatherwood v. State, 539 So. 2d 1378 (Miss. 1989), the court held that where a defendant pleads guilty because of reliance on the erroneous advice of counsel, a vacation of the plea and remand to the lower court are warranted. *Id.* at 1387-88. The court found that substantial evidence existed to show that the defendant entered the guilty plea to capital murder because of his reliance on his attorney's erroneous advice that a guilty plea would prevent the State from presenting evidence of the details of the murder during sentencing. *Id.* at 1382-83 (discussing Coleman v. State, 378 So. 2d 640 (Miss. 1979)); *see* Hill v. Lockhart, 474 U.S. 52, 56 (1985) (voluntariness of plea depends on whether advice was within range of competence demanded of criminal attorneys); Strickland v. Washington, 466 U.S. 668, 686 (1984) (right to counsel is right to effective counsel); Reynolds v. State, 521 So. 2d 914, 918 (Miss. 1988) (to challenge guilty plea because of ineffective assistance of counsel, defendant must show "unprofessional errors of substantial gravity"); Odom v. State, 498 So. 2d 331, 333-34 (Miss. 1986) (advice by defense counsel that was correct at time given and only later became incorrect was not grounds for ineffective assistance of counsel claim); Evans v. State, 485 So. 2d 276, 282 (Miss. 1986) (no identifiable lapse in defense representation shown); Coleman v. State, 483 So. 2d 680, 684 (Miss. 1986) (defendant's sixth amendment right not violated where defense counsel did not call every available character witness in mitigation); Leatherwood v. State, 473 So. 2d 964, 969-70 (Miss. 1985) (defendant entitled to evidentiary hearing on issue of whether he involuntarily pled guilty on basis of misadvice of counsel).

In Carol v. State, 540 So. 2d 1330 (Miss. 1989), the court held that where an attorney represents more than one defendant, the test to determine whether a conflict exists in such representation is whether the defendants' defenses conflict. *Id.* at 1333.

[82] *See infra* notes 83-99 and accompanying text.

[83] MISS. CODE ANN. § 99-17-1 (Supp. 1989), which provides a *statutory* right to a speedy trial states that "all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned." *Id.*

[84] In Smith v. State, 550 So. 2d 406 (Miss. 1989), the court held that compliance with the statutory right to a speedy trial "does not necessarily mean that a defendant's constitutional right to a speedy trial has been respected." *Id.* at 408 (citing Bailey v. State, 463 So. 2d 1059, 1062 (Miss. 1985); Perry v. State, 419 So. 2d 194, 198 (Miss. 1982)). Upon a balancing of the four factors laid down in Barker v. Wingo, 407 U.S. 514, 533 (1972), the court found that where the accused was tried 370 days after his arrest, the state did not show good cause for the delay, and the accused was prejudiced by such delay in that habitual offender status became available, the accused was denied his constitutional right to a speedy trial, even though this assertion was not made until five days before trial. *Smith*, 550 So. 2d at 408-09.

In *Barker*, the United States Supreme Court enumerated four factors that must be considered in determining if a defendant has suffered a violation of his constitutional

guilty in June, 1983, to two counts of burglary.[86] Six months later, the circuit court deferred sentencing for one year but imposed several "probation-like" conditions,[87] the judge's order including the following language: "Unless the Defendant has a legal or lawful excuse, a failure to perform any of the . . . conditions will result in a penitentiary sentence."[88]

Four years passed, and nothing else occurred concerning the sentencing of the defendant until 1987, when the assistant district attorney requested a sentencing date after learning that the defendant had been arrested for possession of cocaine.[89] In August, 1987, following a sentencing hearing,[90] the defendant was sentenced to serve two years on each of the burglary charges with the sentences to run concurrently.[91]

The Mississippi Supreme Court vacated the sentence and released the defendant from custody, holding that the delay in sentencing constituted a violation of the defendant's sixth amendment right to a

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right to a speedy trial: (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his sixth amendment right, and (4) whether the defendant was prejudiced by the delay. *Barker*, 407 U.S. at 533. The Court held that these factors "must be considered together with such other circumstances as may be relevant . . . . [C]ourts must still engage in a difficult and sensitive balancing process." *Id.*

[85] 554 So. 2d 313 (Miss. 1989).

[86] *Trotter*, 554 So. 2d at 314. At the time, the defendant, Terence Ittis Trotter, was 16 and in the 12th grade. *Id.*

[87] *Id.* In August, 1983, Trotter appeared before the Circuit Court of Lauderdale County for sentencing, but the judge deferred sentencing until December, 1983. *Id.* The conditions were as follows: (1) Trotter was to move to Detroit to live with his parents and was to stay at home at night; (2) he was to report daily regarding the identity of his employer and how much he was making; (3) he was to pay one-half of his weekly earnings to the circuit clerk for restitution or attorney's fees; (4) he was not to drink alcohol or use drugs; (5) he was to report to the court again in December, 1984. *Id.*

[88] *Id.*

[89] *Id.* at 314-15. Trotter was never indicted or tried on the cocaine possession charge. *Id.* at 315. In the four-year interim, Trotter completed high school and served two years in the armed forces, from which he was honorably discharged. *Id.* at 314.

[90] *Id.* at 315. At the 1987 sentencing hearing, Trotter and his stepfather testified that Trotter had performed at least four months of community service as ordered by the judge at the first sentencing hearing and had paid approximately $600 to the court for disbursal to the victim or attorney. *Id.* They also testified that in December, 1984, they attended a hearing with the judge and left, believing that the entire matter was over. *Id.* at 315-16. Trotter's attorney stated that through July, 1985, he made futile attempts to contact the district attorney's office to learn the status of Trotter's case. *Id.* at 316. Having made no progress in these attempts, he finally closed the file. *Id.* The district attorney admitted that the state did not try to get Trotter sentenced on the burglary charges until he was arrested on the cocaine possession charge. *Id.*

[91] *Id.* at 315.

speedy trial.[92] Following the four factors enunciated in *Barker v. Wingo*,[93] the court first found a delay in sentencing of over four years to be "presumptively prejudicial," thus triggering a further analysis of the other *Barker* factors.[94] The court next determined that the state failed to show good cause for the delay in sentencing the defendant.[95] Finding that the burden was on the state to request the imposition of sentence on the defendant, the court held that in light of the attendant circumstances, the defendant's failure to demand a speedy sentencing did not weigh heavily against him.[96] Finally, the court concluded that although it was not required to find that the defendant had made an "affirmative showing of prejudice" in order to find he was denied a right to a speedy trial,[97] the defendant was prejudiced by the delayed

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[92] *Id.* at 318-19 (citing Juarez-Casares v. United States, 496 F.2d 190, 193 (5th Cir. 1974)). Recognizing that the United States Supreme Court has never explicitly found that sentencing comprises a part of trial for the purposes of the sixth amendment, the court noted that the Supreme Court "has suggested that an unreasonable delay in sentencing may constitute a violation of the sixth amendment." *Id.* at 316 (citing Pollard v. United States, 352 U.S. 354 (1957)). The court stated, however, that the United States Court of Appeals for the Fifth Circuit has specifically found that sentencing does constitute a part of the trial in the analysis of the right to a speedy trial. *Id.* (citing Juarez-Casares v. United States, 496 F.2d 190, 192 (5th Cir. 1974)); *see* United States v. Campbell, 531 F.2d 1333, 1335 (5th Cir. 1976) (four-year delay in starting sentence study unreasonable), *cert. denied*, 434 U.S. 851 (1977); 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 521.1 (1981) (discussion of time of sentencing, reasonableness, and delay). Further, citing Yates v. State, 342 So. 2d 312 (Miss. 1977), the court determined that it had not specifically held that sentencing is a part of the trial for sixth amendment purposes but that it had previously employed the *Barker* factors in this context. *Trotter*, 554 So. 2d at 316.

[93] *See supra* note 84.

[94] *Trotter*, 554 So. 2d at 317 (citing Juarez-Casares v. United States, 496 F.2d 190, 190 (5th Cir. 1974); United States v. James, 459 F.2d 443 (5th Cir.), *cert. denied*, 409 U.S. 872 (1972); Beavers v. State, 498 So. 2d 788 (Miss. 1986); Bailey v. State, 463 So. 2d 1059 (Miss. 1985)). Even the State agreed that the delay in sentencing Trotter was unreasonable. *Id.*

[95] *Id.* The court rejected the state's argument that it had delayed sentencing for Trotter's benefit. *Id.* The court cited Perry v. State, 419 So. 2d 194 (Miss. 1982), for the proposition that where the defendant does not cause the delay and the state is unable to show good cause for such delay, the delay is weighed against the state. *Trotter*, 554 So. 2d at 317; *see* Vickery v. State, 535 So. 2d 1371, 1375 (Miss. 1986) (state bears burden of showing cause for delay; where no reason is given, "the clock ticks against the State," and 270-day period is not tolled).

[96] *Trotter*, 554 So. 2d at 317. The court opined that because Trotter completed all of the probation-like conditions imposed on him, he "had good reason to believe that he would not be sentenced," especially when the language of the judge's order was considered. *Id.* Thus he had no reason to demand a speedy sentencing. *Id.*

[97] *Id.* at 318 (discussing Moore v. Arizona, 414 U.S. 25, 26-27 (1973)).

sentencing.[98] Weighing the four *Barker* factors, the court held that under the particular circumstances, the defendant's constitutional right to a speedy trial was in fact violated by the delay in sentencing.[99]

D. Eighth Amendment[100]

In 1989, the Mississippi Supreme Court addressed the constitutional consequences of imposing the death penalty on a defendant who participates in a felony during which a murder is committed, not by the defendant himself, but by an accomplice.[101] In *Reddix v. State*,[102] the defendant, Willie N. Reddix, was convicted of capital murder and sentenced to death.[103] Reddix confessed that he and an accomplice had planned to rob the victim but that he did not physically aid in the

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[98] *Id.* The court found that Trotter was "almost assuredly prejudiced by the anxiety of having that uncertainty [of eventually being sentenced] hanging over him like a Damocles sword for those many months." *Id.* The court further noted that Trotter's sentences on the burglary charges "may have been influenced by the judge's knowledge of Trotter's arrest on a drug charge after the 'probationary' period had expired." *Id.* (distinguishing Yates v. State, 342 So. 2d 312, 316 (Miss. 1977)).

[99] *Id.* Justice Hawkins dissented, arguing that the sixth amendment does not apply after a conviction and that Trotter experienced no prejudice by the delay. *Id.* at 319 (Hawkins, J., dissenting) (citing State v. Steelman, 126 Ariz. 19, 612 P.2d 475, *cert. denied*, 449 U.S. 913 (1980); State v. Johnson, 363 So. 2d 450 (La. 1978)). The Mississippi Supreme Court decided the following cases in 1989, which also dealt with the sixth amendment: Turner v. State, No. 03-82, slip op. at 13 (Miss. Nov. 22, 1989) (black defendant suffered no constitutional violation or prejudice because of exemption of jurors who are illiterate, under age 21, or over age 65, or because grand jury foreman was not black); Smith v. State, 550 So. 2d 406, 408-09 (Miss. 1989) (compliance with MISS. CODE ANN. § 99-17-1 (1972), Mississippi's speedy trial statute, "does not necessarily mean that a defendant's constitutional right to a speedy trial has been respected"; and if violated, only remedy is dismissal of charges against him); Keyes v. State, 549 So. 2d 949, 951 (Miss. 1989) (no constitutional right to trial by jury on question of whether criminal defendant is habitual offender); Harden v. State, 547 So. 2d 1150, 1150-52 (Miss. 1989) (parole statute was permissive and did not generate reasonable expectation of parole amounting to protected liberty interest).

[100] The eighth amendment prohibits the infliction of cruel and unusual punishment. U.S. CONST. amend. VIII.

[101] Besides the case treated textually, the court also decided Ashley v. State, 538 So. 2d 1181 (Miss. 1989), in which the court held that even where the trial judge lacks sentencing discretion, he must review a particular sentence in light of the constitutional principles of proportionality of Solem v. Helm, 463 U.S. 277 (1983). *See also* Magee v. State, 542 So. 2d 228, 236 (Miss. 1989) (habitual offender statute contained at § 99-19-83 of Mississippi Code is not unconstitutional as cruel and unusual punishment).

[102] 547 So. 2d 792 (Miss. 1989).

[103] *Reddix*, 547 So. 2d at 793. Reddix was indicted in February, 1975, by a Harrison County grand jury for the capital murder of Biloxi businessman, Arthur Weinberger. *Id.* Reddix, who was mildly retarded, was subsequently tried and found guilty. *Id.*

attack on the victim.[104] Following a long series of proceedings in both state and federal courts,[105] the Mississippi Supreme Court held that Reddix's death sentence could withstand neither a proportionality re-

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[104] *Id.* at 794. On December 2, 1974, when Reddix was 18 years old, he distracted Weinberger while his accomplice, Larry Jones, struck Weinberger three times with a wrench. *Id.*

[105] *Id.* at 793-94. The first appellate proceeding occurred in 1976, when the Mississippi Supreme Court reversed Reddix's conviction and ordered a new trial. *Id.* at 793; *see* Reddix v. State, 342 So. 2d 1306 (Miss. 1977) (*Reddix I*). On retrial, Reddix was again convicted of capital murder and sentenced to death. *Reddix*, 547 So. 2d at 793. The Mississippi Supreme Court affirmed this conviction and sentence. *Id.*; *see* Reddix v. State, 381 So. 2d 999 (Miss. 1980) (*Reddix II*). Reddix then petitioned the United Sates Supreme Court for a writ of certiorari, which was denied. *Reddix*, 547 So. 2d at 793 (citing Reddix v. Mississippi, 449 U.S. 986 (1980)). Reddix's application for leave to file a petition for writ of error *coram nobis* with the Mississippi Supreme Court was also denied. *Id.*

Having been denied state post-conviction relief, Reddix petitioned the United States District Court for the Northern District of Mississippi for a writ of habeas corpus. *Id.* On the court's motion, the petition was transferred to the United States District Court for the Southern District of Mississippi, which granted the state's motion for summary judgment and dismissed Reddix's petition. *Id.* On Reddix's motion for reconsideration, the district court vacated its prior opinion and order, granted the writ, and ordered Reddix released immediately. *Id.* (citing Reddix v. Thigpen, 554 F. Supp. 1212 (S.D. Miss. 1983)).

The state appealed the district court's order to the Fifth Circuit, which affirmed the vacation of Reddix's death sentence, basing its decision on Enmund v. Florida, 458 U.S. 782 (1982), which required a jury determination of intent to kill before a death sentence could be carried out. *Reddix*, 547 So. 2d at 793 (citing Reddix v. Thigpen, 728 F.2d 705 (5th Cir. 1984)). Furthermore, the Fifth Circuit reversed on the issue of Reddix's release and remanded the case so that all claims might be addressed. *Id.* (citing Reddix v. Thigpen, 728 F.2d 705 (5th Cir. 1984)). On petition for rehearing, the Fifth Circuit found that although there was sufficient evidence to support a determination that Reddix possessed the personal intent to kill, the death sentence should be vacated, since the jury had not been required to find such intent. *Id.* (citing Reddix v. Thigpen, 732 F.2d 494 (5th Cir. 1984)).

Subsequently, the United States Supreme Court denied the state's petition for a writ of certiorari. *Id.* (citing Thigpen v. Reddix, 469 U.S. 990 (1984)). On remand, the United States District Court for the Southern District of Mississippi denied Reddix's petition for a writ of habeas corpus but ordered a new sentencing hearing. *Id.* The state's motion to reconsider under FED. R. CIV. PRO. 60(b) was denied. *Reddix*, 547 So. 2d at 793.

Reddix then appealed the district court's denial of habeas corpus relief to the Fifth Circuit, which affirmed. *Id.* at 794 (citing Reddix v. Thigpen, 805 F.2d 506 (5th Cir. 1986)). However, the Fifth Circuit again vacated Reddix's death sentence and remanded the case for a determination of his personal intent to kill. *Id.* (citing Reddix v. Thigpen, 805 F.2d 506 (5th Cir. 1986)). Significantly, the court modified its 1984 opinion, stating that under Cabana v. Bullock, 474 U.S. 376 (1986), a jury determination of personal intent to kill was not required; instead, the state court could address this issue first. *Reddix*, 547 So. 2d at 794 (citing Reddix v. Thigpen, 805 F.2d 506 (5th Cir. 1986)).

view nor the requirements of *Enmund v. Florida*.[106]

Addressing the first issue of whether the death sentence in the instant case was disproportionate to the penalty imposed in similar cases, Justice Anderson, writing for the court, noted that the court was required by both the United States Constitution and state law to perform a proportionality review any time the death penalty had been imposed.[107] Although it had previously conducted such a review in Reddix's case,[108] the court found it necessary to reconsider the proportionality of Reddix's sentence.[109] Justice Anderson determined that, considering the crime and the defendant, the imposition of the death penalty in the case at bar was disproportionate to the sentence imposed in similar capital cases.[110]

The court next considered whether the *Enmund* test for imposing the death penalty had been met, noting that as *Enmund v. Florida* had been decided since its original proportionality review of Reddix's sentence, the proportionality question was irrelevant if the *Enmund* requisites for imposition of the death penalty did not exist.[111] The court held that under the eighth amendment to the United States Constitution, the death penalty may not be imposed on a defendant who aids and abets a felony during which a murder is committed by others but

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[106] *Reddix*, 547 So. 2d at 793. On the State's motion to reinstate the death penalty and set a new execution date, the Mississippi Supreme Court originally affirmed Reddix's death sentence. *Id.* The appeal of the instant case came before the court on Reddix's petition for rehearing and resulted in the court's withdrawal of its original opinion. *Id.*; *see* Enmund v. Florida, 458 U.S. 782, 788 (1982) (eighth and fourteenth amendments are violated by imposition of death penalty on person who aids and abets felony in course of which murder is committed by others, but who does not himself kill, attempt to kill, intend to kill, or contemplate that life will be taken).

[107] *Id.* at 794; *see* MISS. CODE ANN. § 99-19-105 (Supp. 1989) ("Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court").

[108] *Reddix*, 547 So. 2d at 794 (citing *Reddix II*, 381 So. 2d at 1011-13).

[109] *Id.* The court reasoned that the "passage of time and subsequent developments" demanded a reconsideration of Reddix's sentence. *Id.*

[110] *Id.* at 795. Citing Bullock v. State, 525 So. 2d 764 (Miss. 1987), in which the court held the defendant's death sentence disproportionate, the court found the facts of the instant case almost indistinguishable from those in *Bullock*, except that Reddix was less culpable than Bullock. *Reddix*, 547 So. 2d at 794. The court stated that in *Bullock*, a sentence of life imprisonment was substituted for the death penalty for two reasons: (1) with two exceptions, the death sentence had not been imposed solely because a defendant contemplated the use of lethal force; and (2) Bullock's accomplice, who had actually killed the victim, received a life sentence. *Id.* Similarly, Jones, Reddix's accomplice, was sentenced to life imprisonment, rather than to death. *Id.* (citing Jones v. State, 685 F. Supp. 604, 607 (S.D. Miss. 1988)).

[111] *Reddix*, 547 So. 2d at 795; *see supra* note 106.

who does not himself kill, attempt to kill, intend that the killing occur, or contemplate the use of lethal force.[112] Declining either to remand the case or to determine from the record the existence of *Enmund* requisites,[113] the court chose instead to impose a life sentence on Reddix.[114]

E. Fourteenth Amendment[115]

In 1989, the Mississippi Supreme Court considered whether a state statute which makes the possession of beer unlawful in any county which has elected to be "dry"[116] constitutes a denial of equal protection under both the state and federal constitutions.[117] In *Dantzler v. State*,[118] the defendant was convicted of possession of beer[119] in the "dry" part of Lamar County,[120] while traveling home after having le-

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[112] *Reddix*, 547 So. 2d at 795 (quoting *Enmund*, 458 U.S. at 797).

[113] *Id.* Under Bullock v. State, 525 So. 2d 764, 768 (Miss. 1987), the court found that it had the "authority to determine from the record whether or not the *Enmund* requisites have been proven beyond a reasonable doubt." *Reddix*, 547 So. 2d at 795. The court further stated that where it is unable to determine the existence of at least one *Enmund* requisite, it is required under *Bullock* to remand the case for an *Enmund* hearing. *Reddix*, 547 So. 2d at 795.

[114] *Reddix*, 547 So. 2d at 795. Citing Cabana v. Bullock, 474 U.S. 376 (1986), the court determined that it could forgo the ascertainment of *Enmund* requisites and could itself impose a life sentence. *Reddix*, 547 So. 2d at 795. The court reasoned that although it would usually remand a case such as the one at bar in which new facts clouding the issue of the defendant's state-of-mind had emerged, because of the passage of time, the imposition of life was warranted. *Id.* Thus, the court remanded for resentencing. *Id.*

Justice Prather concurred in the granting of the petition for rehearing but stated "that the correct disposition of this case in its present posture would be to remand for a new sentencing hearing to permit a circuit court jury to make fact findings on the *Enmund* issue." *Id.* at 796 (Prather, J., concurring). Chief Justice Roy Noble Lee dissented, stating that, in his opinion, the record demonstrated that the *Enmund* test had been met, and that the death sentence should therefore be reinstated. *Id.* at 797-99 (Lee, Roy Noble, J., dissenting).

[115] The fourteenth amendment prohibits states from denying persons "equal protection of the laws." U.S. CONST. amend. XIV.

[116] MISS. CODE ANN. § 67-3-13 (1972).

[117] In another fourteenth amendment case, Sutherland v. State, 537 So. 2d 1360 (Miss. 1989), the court held that Mississippi's habitual offender statute, MISS. CODE ANN. § 99-19-81 (Supp. 1989), does not violate the equal protection clause of the United States Constitution by subjecting recidivist rapists, kidnappers, and murderers to life imprisonment without benefit of parole. *Sutherland*, 537 So. 2d at 1362.

[118] 542 So. 2d 906 (Miss. 1989).

[119] *Dantzler*, 542 So. 2d at 907. The defendant, Mose Dantzler, Sr., was convicted in the Justice Court of Lamar County for possession of 17 cans of beer. *Id.* The court sentenced him to 90 days in jail and fined him $250. *Id.*

[120] *Id.* The Lamar County electorate voted the county "dry" in 1937 and again in

gally purchased the beer in Hattiesburg.[121]

The defendant appealed his conviction to the Circuit Court of Lamar County, which denied his motion to dismiss.[122] However, the circuit court granted his motion for interlocutory appeal to the Mississippi Supreme Court on the question of whether section 67-3-13 of the Mississippi Code of 1972, as amended, which makes possession of beer unlawful in any county which has elected to prohibit the transportation, storage, sale, distribution, receipt, and/or manufacture of wine or beer in such county, operates as an unconstitutional denial of equal protection.[123]

The Mississippi Supreme Court affirmed, holding that section 67-3-13 did not deny the defendant equal protection.[124] After an extensive discussion of the legislative history of section 67-3-13 and the unquestioned validity of the statute,[125] Chief Justice Roy Noble Lee, writing for the court, noted, first that there is no inherent right to possess intoxicating liquors and, second that the state totally controls all issues involving alcoholic beverages within its borders.[126] The court cited *Joseph E. Seagram & Sons, Inc. v. Hostetter*[127] for the proposition that courts lack the authority to "substitute their social and economic beliefs" for the judgment of the legislature.[128] The chief justice concluded that adoption of the defendant's argument would allow people to buy alcoholic beverages in a "wet" area and carry them into a "dry" area to be drunk, "even where a majority of the people have voted to maintain

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1978. *Id.*

[121] *Id.* Pursuant to an election held under MISS. CODE ANN. § 67-3-9 (1972), the City of Hattiesburg is "wet," thus permitting the legal possession of beer. *Dantzler*, 542 So. 2d at 907. Dantzler purchased the beer in the western portion of Hattiesburg, which, because of annexation, is located in "dry" Lamar County. *Id.* However, as the elections in both Lamar County and Hattiesburg to determine whether the possession of beer was legal occurred before the annexation, the part of Hattiesburg located in Lamar County became "wet." *Id.*

[122] *Dantzler*, 542 So. 2d at 907.

[123] *Id.* at 907, 910.

[124] *Id.* at 912. The court also found that Dantzler did not suffer any unconstitutional violation of his right to privacy. *Id.*

[125] *Id.* at 907-09; *see* Russell v. State, 231 Miss. 176, 184, 94 So. 2d 916, 917 (1957) (discussing history of alcohol possession laws); Hoyle v. State, 216 Miss. 330, 333-34, 62 So. 2d 380, 382 (1953) (same); *see also* Kelly v. State, 237 Miss. 112, 113 So. 2d 540, 543 (1959) (same).

[126] *Dantzler*, 542 So. 2d at 910, 911 (citing Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138-39 (1939); State v. Wood, 187 So. 2d 820, 831 (Miss. 1966)).

[127] 384 U.S. 35, 41-47 (1966).

[128] *Dantzler*, 542 So. 2d at 912 (quoting Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 41-47 (1966)).

such areas 'dry,' " thus effectively negating Mississippi's local option law and thwarting "the will and rights of the people by destroying their freedom of choice."[129]

Justice Hawkins dissented, arguing that under the constitution, no law which makes it legal for a person to possess beer in one place can make that person a criminal for possessing beer "in his own home *a hundred feet away*."[130] In a separate dissent, Justice Robertson stated that a purchaser of alcoholic beverages has an "implied constitutional right" to transport such beverages to his home in a "dry" area and to possess and drink the legally bought liquor in the privacy of his own home.[131]

II. Evidence

In 1989, the Mississippi Supreme Court handed down numerous criminal cases which dealt with evidentiary matters. Many of these decisions involved interpretation of the Mississippi Rules of Evidence.[132]

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[129] *Id.*

[130] *Id.* (Hawkins, J., dissenting). Justice Hawkins agreed that communities have the right to determine the legality of selling alcohol and that the state legislature has the authority "to outlaw statewide—from border to border—the *possession* or sale of alcohol," but he maintained that the effect of the court's decision in the instant case was to leave law enforcement officials with a law they cannot enforce. *Id.* at 912-13.

[131] *Id.* at 913 (Robertson, J., dissenting) (citing Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965); United States v. Gudger, 249 U.S. 373 (1919); *In re* Brown, 478 So. 2d 1033 (Miss. 1985); May v. State, 199 So. 2d 635 (Miss. 1967)).

[132] The Mississippi Supreme Court decided the following cases which, while interpreting the Mississippi Rules of Evidence, are not treated textually: Thornhill v. State, No. 07-58677, slip op. at 6, 7 (Miss. Nov. 22, 1989) (where defendant's statements to police made pursuant to *Miranda* warnings constitute statement against interest, they are admissible at trial); Turner v. State, No. 03-82, slip op. at 14-15 (Miss. Nov. 22, 1989) (trial judge did not abuse discretion in admitting photographs of victim which were neither gruesome nor prejudicial); Shell v. State, 554 So. 2d 887, 893-95 (Miss. 1989) (statements of defendant's wife to sheriff were not subject to spousal privilege under Rule 504); Sayles v. State, 552 So. 2d 1383, 1385-88 (Miss. 1989) (denial of cross-examination as to matter probative of witness' credibility which substantially affects defendant's rights constituted reversible error pursuant to Rule 611(b)); Shook v. State, 552 So. 2d 841, 849 (Miss. 1989) (statement made in presence of accused who is profoundly deaf was not hearsay under Rule 801(c)); Hoover v. State, 552 So. 2d 834, 840 (Miss. 1989) (prior inconsistent statements by prosecutor made within scope of employment may be used in subsequent trial of same defendant or co-indictee under Rule 801(d)(2)); Nathan v. State, 552 So. 2d 99, 107-08 (Miss. 1989) (where trial judge made on-record finding that prior crime of defendant was within 10-year time limit and more probative than prejudicial, judge will be reversed only for abuse of discretion); Davis v. State, 551 So. 2d 165, 172-73 (Miss. 1989) (unpleasant or gruesome photographs are admissible if rele-

In a significant line of cases, the court discussed the Rules in the context of the court's rule-making power vis-a-vis that of the legislature.[133] Finally, the court also dealt with other evidentiary issues which did not directly implicate the Rules of Evidence.[134]

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vant); Stringer v. State, 548 So. 2d 125, 133-34 (Miss. 1989) (unpleasant or gruesome photographs are admissible if relevant under Rule 401); Evans v. State, 547 So. 2d 38, 40-41 (Miss. 1989) (victim's statement to housemate that she had been raped by defendant was admissible hearsay under Miss. R. Evid. 803(1) and 803(2)); Blanks v. State, 547 So. 2d 29, 37 (Miss. 1989) (where defendant shot and killed friend, evidence that defendant had previously threatened another friend with gun is inadmissible under Rule 404(b)); Hall v. State, 546 So. 2d 673, 674-75 (Miss. 1989) (where defendant called police informant as witness, trial court should have declared witness hostile for purposes of Rule 611); Williams v. State, 543 So. 2d 665, 667 (Miss. 1989) (where defendant was charged with rape of stepdaughter, her testimony concerning threats made by defendant to her were not violative of Rules 403 and 404); White v. State, 542 So. 2d 250, 257-58 (Miss. 1989) (evidence of prior conviction for assault with intent to rape was admissible in murder prosecution under Rule 403); Peterson v. State, 540 So. 2d 1340, 1341 (Miss. 1989) (where defendant's testimony on direct examination conflicts with earlier statements made to police, state may question rebuttal witness concerning defendant's prior contradictory statement to attack his credibility); Whitehurst v. State, 540 So. 2d 1319, 1322-24 (Miss. 1989) (admissibility of blood alcohol tests taken while defendant was unconscious are no longer prohibited under MISS. CODE ANN. § 63-11-7 (1972) but are now admissible under Rules 501 and 1103); Moffett v. State, 540 So. 2d 1313, 1316-18 (Miss. 1989) (Rule 615 not violated where defense counsel permitted witness to enter courtroom and examine state's exhibit during trial recess); Clanton v. State, 539 So. 2d 1024, 1028 (Miss. 1989) (under Rule 613, prior inconsistent statements can be used to impeach, but prior inconsistent statements may not be employed "to bolster" witness; for hearsay to qualify as exception under Rule 803(24), statement must meet requirements therein).

[133] *See infra* notes 191-220 and accompanying text.

[134] The following cases dealing with miscellaneous evidentiary matters are not treated textually: Thornhill v. State, No. 07-58677, slip op. at 7-9 (Miss. Nov. 22, 1989) (where prosecution presents evidence contrary to the defendant/sole witness' account of crime, question becomes one for jury, and *Weathersby* rule is not followed); Turner v. State, No. 03-82, slip op. at 23-24 (Miss. Nov. 22, 1989) (state's references to religion and request that defendant demonstrate how he shot victim were proper); Dennis v. State, 555 So. 2d 679, 683 (Miss. 1989) (trial court did not err in refusing to exclude allegedly prejudicial evidence of minimal probative value); Kelly v. State, 553 So. 2d 517, 519 (Miss. 1989) (admission of testimony by non-expert characterizing use of physical evidence in manufacture of rock cocaine was harmless error); Simpson v. State, 553 So. 2d 37, 39-40 (Miss. 1989) (where witness was allowed to testify in violation of MISS. UNIF. CRIM. R. CIR. CT. P. 4.06(a)(1) and rule of Acevedo v. State, 467 So. 2d 220 (Miss. 1985), such testimony does not constitute reversible error absent prejudice to defendant); Nathan v. State, 552 So. 2d 99, 104-05 (Miss. 1989) (where admittedly suggestive and unnecessary pretrial identification is admissible, reliability of identification is paramount); Garrett v. State, 549 So. 2d 1325, 1328-31 (Miss. 1989) (where information regarding defendant's willingness to take polygraph test is inadvertently presented to jury, court must consider "nature of the error and all circumstances attendant in its disclosure" in ascertaining whether such information substantially prejudiced defendant); Stokes v.

A. The Mississippi Rules of Evidence

Rules 401-02

In the case of *Kolb v. State*,[135] the defendant was convicted of sexual battery involving a young boy.[136] During its case in chief, the State introduced two letters written by the defendant which implicated him in the conduct in question and which intimated that he was a homosexual.[137] The defendant objected to the introduction of the letters, maintaining that they were irrelevant.[138]

State, 548 So. 2d 118, 120-22 (Miss. 1989) (where voluntariness of defendant's confession and waiver of rights is challenged, prosecution has burden of establishing admissibility beyond reasonable doubt); Dunn v. State, 547 So. 2d 42, 45-46 (Miss. 1989) (confession following offer of leniency in return for confession is not voluntary and is therefore inadmissible); Blanks v. State, 547 So. 2d 29, 33-34 (Miss. 1989) (where defendant is only eyewitness to slaying and his version is uncontradicted, reasonable, and credible under the *Weathersby* rule, defendant is entitled to directed verdict of acquittal); Coleman v. State, 545 So. 2d 3, 5 (Miss. 1989) (where physical evidence is positively identified by witness, that evidence is admissible notwithstanding failure to establish chain of custody); Hentz v. State, 542 So. 2d 914, 917 (Miss. 1989) (relevancy and admissibility of evidence are largely within discretion of trial court and will not be reversed unless that discretion has been abused); Layne v. State, 542 So. 2d 237, 239-41 (Miss. 1989) (where defendant was given *Miranda* warnings three times, signed waiver of rights, and was told that district attorney would be informed of his cooperation without any further promises, trial court's admission of defendant's statement was affirmed); Carol v. State, 540 So. 2d 1330, 1333 (Miss. 1989) (state barred from offering defendant's statements regarding location of stolen property in its case in chief where State assured court no such evidence would be offered at that time); Whitehurst v. State, 540 So. 2d 1319, 1324-26 (Miss. 1989) (no reversible error in court's denial of re-cross where there was no claim of oversight and no reason stated why matter was not pursued on cross examination); Wright v. State, 540 So. 2d 1, 4 (Miss. 1989) (by presenting evidence in their own behalf, defendants waived any error in trial court's refusal to grant them directed verdict at close of state's case in chief; defendant's failure to renew motion for directed verdict at close of all evidence constituted waiver of objection to suffiency of evidence); Williams v. State, 539 So. 2d 1049, 1050-51 (Miss. 1989) (allowing children to use anatomically correct dolls while testifying is matter of discretion with trial court; great care and caution should be exercised by trial court when so allowing; where defense expert was denied opportunity by trial court to testify on certain matters, it was reversible error to allow prosecution's expert to testify on same matters); Harris v. State, 537 So. 2d 1325, 1329 (Miss. 1989) (trial court's ruling on admissibility of confession will not be disturbed unless contrary to overwhelming weight of evidence).

[135] 542 So. 2d 265 (Miss. 1989). The defendant, John Daniel Kolb, was sentenced as a recidivist to ten years imprisonment without eligibility for parole. *Kolb*, 542 So. 2d at 266.

[136] *Id.* The conviction was pursuant to the sexual battery statute contained at MISS. CODE ANN. § 97-3-95 (Supp. 1989). *Kolb*, 542 So. 2d at 269.

[137] *Kolb*, 542 So. 2d at 267.

[138] *Id.* at 269. Rule 401 of the Mississippi Rules of Evidence states: " 'Relevant Evi-

The Mississippi Supreme Court affirmed the conviction.[139] According to the court:

> Because the vast majority of the human race does not have sexual urges toward small children such as those manifested by [the defendant], and sexual acts such as those with which he was charged are repugnant and difficult to believe, when any person is charged with such conduct it is relevant that the individual did have those sexually deviant tendencies. The letters were relevant as tending to show [the defendant] had such urges conjoined with the issue of whether he in fact engaged in the act with which he was charged.[140]

Rule 403

In *Gray v. State*,[141] Charles E. Gray was convicted under section 97-29-45(1)(c) of the Mississippi Code on eight counts of making harassing phone calls.[142] The counts consisted of one call to Melissa Charnes and seven calls to Juanita Hunt.[143] Hunt, who was Gray's neighbor, recognized his voice and recorded the conversations.[144] Hunt

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dence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MISS. R. EVID. 401. Rule 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Mississippi, or by these rules. Evidence which is not relevant is not admissible." MISS. R. EVID. 402.

[139] *Kolb*, 542 So. 2d at 270.

[140] *Id.* at 269. The court also noted that during direct examination the defendant had discussed the homosexuality issue, denying that he had engaged in that type of conduct. *Id.* at 270. The court noted that as a result of this action, the state was entitled under Rule 404 to cross-examine him concerning this character trait. *Id.* Rule 404 states, in pertinent part:

> (a) Character Evidence Generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except: (1) *Character of Accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same.

MISS. R. EVID. 404(a)(1).

[141] 549 So. 2d 1316 (Miss. 1989).

[142] *Gray*, 549 So. 2d at 1317. Section 97-29-45(1)(c) states: "(1) It shall be unlawful for any person or persons: . . . (c) To make a telephone call, whether or not conversation ensues without disclosing his identity and with intent to annoy, abuse, threaten or harass any person at the called number." MISS. CODE ANN. § 97-29-45(1)(c) (Supp. 1989).

[143] *Gray*, 549 So. 2d at 1317-18.

[144] *Id.* at 1318.

later played the tape to Charnes, who recognized the voice as belonging to the person who had telephoned her.[145] Charnes later testified at trial to this effect.[146]

On appeal the Mississippi Supreme Court vacated the convictions,[147] holding that under Rule 403 of the Mississippi Rules of Evidence, the use of Hunt's tape recording to convict Gray of making a harassing phone call to Charnes "was without a doubt unfairly prejudicial, served only to confuse the issues in the case, and may have misled the jury's deliberations."[148]

Rule 404(b)

In *Darby v. State*,[149] the defendant was convicted of aggravated assault.[150] At trial, the defendant attempted to show that he shot the victim, Eugene Richardson, in self-defense.[151] As part of this attempt, the defendant tried to introduce his status as a police informer knowledgeable of certain illegal activity on the part of Richardson and that as a result, he could have been reasonably apprehensive of bodily harm from Richardson.[152] The defendant alleged that the trial judge informed defense counsel that if the defendant's status as an informer was introduced, the state would be free to present evidence of prior crimes committed by the defendant for which he had not been convicted.[153]

The Mississippi Supreme Court held that under Rule 404(b),[154]

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[145] *Id.*

[146] *Id.*

[147] *Id.* at 1325.

[148] *Id.* at 1323. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MISS. R. EVID. 403. The court noted that the Hunt tape was the only evidence linking the defendant to the telephone call to Charnes. *Gray*, 549 So. 2d at 1323. The court went on to state that joinder of count one (Charnes) with counts two through eight (Hunt) was in error because the offenses were not "based on the same act or transaction" or "part of a common scheme or plan." *Id.* at 1321 (citing MISS. CODE ANN. § 99-7-2 (Supp. 1989)). According to the court, since evidence of the calls to Hunt would not be admissible in a separate trial involving Charnes, the counts should not have been joined. *Id.* at 1323.

[149] 538 So. 2d 1168 (Miss. 1989). The trial court sentenced the defendant, Thurman Darby, to 20 years imprisonment. *Darby*, 538 So. 2d at 1170.

[150] *Id.*

[151] *Id.*

[152] *Id.* at 1173.

[153] *Id.* at 1172.

[154] *Id.* at 1172, 1173. Rule 404(b) states:

where such evidence of prior crimes is offered, the two-step test set forth in *United States v. Beechum*[155] must be used.[156] According to the court:

> It must first be determined that the evidence possesses probative value that is not substantially outweighed by its potential for undue prejudice, and must meet the other requirements of Rule 403. The other requirements being that before an exception to the general rule excluding evidence of other crimes from admission in criminal cases can be invoked, the trial court must be satisfied that 1) there is plain, clear and convincing evidence of a similar offense, 2) the offense is not too remote in time, 3) the element of the similar crime for which there is a recognized exception is a material issue in the case, and 4) there is a substantial need for the probative value of the evidence.[157]

The court noted that in Mississippi the general rule is that evidence of other criminal conduct on the part of the accused is inadmissible, subject to limited exceptions.[158] Applying both Rule 404(b) and Mississippi case law, the court found no exceptions applicable in the case before it.[159] Accordingly, the court held that the trial court had erred in allowing the state to inquire as to prior criminal conduct of the defendant for which no conviction had been obtained.[160] Because such evidence was allowed, the defendant had been denied his right to due process in not being able to present evidence concerning his defense of self-defense.[161]

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

MISS. R. EVID. 404(b).

[155] 582 F.2d 898 (5th Cir. 1978).

[156] *Darby*, 538 So. 2d at 1173.

[157] *Id.*

[158] *Id.* (citing Tobias v. State, 472 So. 2d 398, 400 (Miss. 1985); Donald v. State, 472 So. 2d 370, 372 (Miss. 1985); Mason v. State, 429 So. 2d 569, 572 (Miss. 1983)).

[159] *Id.*

[160] *Id.*

[161] *Id.* at 1173, 1174. The court noted that its decision was consistent with Rule 103. *Id.* at 1173. The Rule provides, in pertinent part: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." MISS. R. EVID. 103(2). However, the court found no error in the trial court's refusal to allow cross-examination of the victim by the defense concerning whether the

In *Lovejoy v. State*,[162] the defendant was convicted of the capital rape of his daughter.[163] At trial, the state introduced into evidence five nude photographs of the victim which the victim testified the defendant took of her.[164] The defendant maintained that this evidence was inadmissible under Rule 404(b).[165]

The court affirmed,[166] holding that the photographs were properly admitted into evidence.[167] The court noted that in a different type of case, such photographs might be inadmissible.[168] However, in a child molestation case, "such photographs are properly admitted into evidence in order to establish the defendant's licentious disposition and lust for the victim."[169]

The court again considered Rule 404(b) in the case of *Ford v. State*.[170] In *Ford*, the defendant was indicted on charges of conspiracy and grand larceny in connection with the theft of $750 from a bank in Senatobia, Mississippi.[171] Ford was found guilty of conspiracy; how-

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victim had "used a gun in committing an auto burglary." *Darby*, 538 So. 2d at 1174. The court noted that under Rule 608(b), cross-examination into specific instances of a witness' conduct is allowed only "if probative of truthfulness or untruthfulness." *Id.* Rule 608(b) states:

> (b) SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness of untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
>
> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

MISS. R. EVID. 608(b).

[162] 555 So. 2d 57 (Miss. 1989). The defendant, Doyle David Lovejoy, was sentenced to life imprisonment. *Lovejoy*, 555 So. 2d at 58.

[163] *Id.*

[164] *Id.* According to the victim, the photographs were taken "when she was ten or eleven years old." *Id.*

[165] *Id.*

[166] *Id.* at 59.

[167] *Id.*

[168] *Id.*

[169] *Id.* The court also stated that "[a]dditionally, for those jurors who disbelieve that a father can have lust for his natural daughter, the photographs show that such lust exists other than in the imagination of the victim." *Id.*

[170] 555 So. 2d 691 (Miss. 1989). The defendant, John Wiley Ford, was sentenced to five years imprisonment. *Ford*, 555 So. 2d at 692.

[171] *Id.*

ever, a mistrial was granted on the grand larceny charge.[172] On retrial, Ford was convicted of grand larceny.[173] Evidence at trial, which consisted of bank tellers' testimony and surveillance photographs, showed that Ford and an accomplice had approached a teller's window at the bank in Senatobia, diverted the teller's attention, and removed $750 from the cash drawer.[174] Evidence also indicated that on the following day, the two men employed the same modus operandi to commit a similar crime in West Memphis, Arkansas.[175] On appeal, Ford maintained that the trial court erred in not granting a new trial because of prejudicial testimony given by a teller from the bank in West Memphis.[176] According to Ford, the Mississippi Supreme Court had never held that Rule 404(b) contemplates the admissibility of subsequent offenses in order to meet one of the exceptions contained in the rule.[177] The state, however, maintained that Rule 404(b) speaks only to " '[e]vidence of other crimes' "[178] and "is silent as to the admissibility of *prior or subsequent offenses.*"[179]

The court allowed the testimony, noting that the modus operandi was identical in both cases,[180] and that *"[t]he latent factor underlying both was [the defendant's] motive and criminal intent."*[181] In addition, the court found that the trial judge properly instructed the jury that this evidence was for the "limited purpose of demonstrating *similarity of method* and *similarity of mode of operation,*"[182] and could not be used to show "that an act done at one time or on one occasion is any evidence or proof whatever that a similar act was done at another

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[172] *Id.* The Mississippi Supreme Court affirmed the conspiracy conviction in Ford v. State, 546 So. 2d 686 (Miss. 1989) (*Ford I*). In that case, the court recognized that "[Rules 401-03] carry forward our traditional view that in a conspiracy prosecution, the range of relevant evidence is quite wide." *Id.* at 689 (citing Peoples v. State, 501 So. 2d 424, 429 (Miss. 1987); McCray v. State, 486 So. 2d 1247, 1251 (Miss. 1986); Griffin v. State, 480 So. 2d 1124, 1126 (Miss. 1985)). In *Ford I*, the court was concerned about basically the same evidence at issue in this case, except there it was aimed at establishing the conspiracy change. *Id.* at 689-90.

[173] *Ford*, 555 So.2d at 692.

[174] *Id.*

[175] *Id.*

[176] *Id.* at 692, 693.

[177] *Id.* at 693.

[178] *Id.* (quoting MISS. R. EVID. 404(b)).

[179] *Id.*

[180] *Id.* at 694.

[181] *Id.* at 695. The court also noted that it was significant that the teller at the Senatobia bank had not witnessed "any untoward activity on the part of [the defendant] and his accomplice." *Id.*

[182] *Id.* (quoting United States v. Hays, 553 F.2d 824, 829 n.11 (2d Cir. 1977)).

time, or on another date, or on another occasion."[183]

4. Rule 405(b)

The case of *McDonald v. State*[184] involved a conviction for aggravated assault.[185] The defendant maintained that he had shot the victim, Stanley Polk, in self-defense.[186] The defendant argued that, according to Rule 405(b), he should have been permitted to introduce evidence concerning prior acts of violence of Polk toward other persons.[187]

The court found no error in the trial court's refusal to allow such evidence.[188] According to the court, "[T]here may very well be limited, and special circumstances in which the accused, in the discretion of the circuit court, would be permitted to give testimony of some specific act of violence, but even then only after it was shown that the accused either saw it, or knew of it."[189] The court noted that in the instant case, at the time of the shooting, the defendant lacked personal knowledge of any prior acts of violence committed by Polk toward other persons.[190]

B. The Rule-Making Power of the Supreme Court

In 1989, the Mississippi Supreme Court decided a trio of cases dealing with hearsay in child sexual abuse cases; and as a result, it had ample opportunity to discuss the court's power to promulgate rules of practice for the courts of this state. In *Hall v. State*,[191] the defendant was convicted of sexual battery involving his five-year-old son.[192] Prior

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[183] *Id.*; *see also* Clanton v. State, 539 So. 2d 1024, 1027 (Miss. 1989) (fact that defendant used weapon involved in crime without owner's permission is relevant to defendant's motive under Rule 404(b)).

[184] 538 So. 2d 778 (Miss. 1989). The defendant, Milas Leon McDonald, was sentenced to 20 years imprisonment. *McDonald*, 538 So. 2d at 779.

[185] *Id.*

[186] *Id.*

[187] *Id.* Rule 405(b) states: "In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct." MISS. R. EVID. 405(b).

[188] *McDonald*, 538 So. 2d at 780.

[189] *Id.*

[190] *Id.* (citing United States v. Beros, 833 F.2d 455 (3d Cir. 1987); United States v. Perez-Casillas, 607 F. Supp. 88 (P.R.D.C. 1985)).

[191] 539 So. 2d 1338 (Miss. 1989). The trial court sentenced the defendant, Michael A. Hall, to 25 years imprisonment. *Hall*, 539 So. 2d at 1341.

[192] *Id.*

to the trial, the prosecution attempted to gain admission of hearsay versions of the child's allegations.[193] Pursuant to the Evidence of Child Sexual Abuse Act,[194] a motion was filed to have the child declared unavailable as a witness.[195] The motion was granted, and the court al-

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[193] *Id.* at 1340.

[194] MISS. CODE ANN. §§ 13-1-401 to -415 (Supp. 1989). Section 13-1-403 of the Act reads:

> Admissibility of child's out-of-court statements.
>
> (1) An out-of-court statement made by a child under the age of twelve (12) describing any act of child abuse, sexual abuse, or any other offense involving an unlawful sexual act, contact, intrusion or penetration performed in the presence of, with, by or on the declarant child, not otherwise admissible, is admissible in evidence to prove the contents thereof, if:
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> (a) Such statement is made for the purpose of receiving assistance or advice in order to prevent or mitigate the recurrence of the offenses, or in order to obtain advice about the psychological, social or familial consequences associated with the offenses; and
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> (b) Such statement is made to a person on whom the child should reasonably be able to rely for assistance, counseling or advice; and
>
> (c) The child either:
>
> (i) Is available to testify; or
>
> (ii) Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. A finding of unavailability except in those situations specified by Rule 804 of the Mississippi Rules of Evidence, shall require a finding by the court, based on the specific behavioral indicators described in § 13-1-411, that the child's participation in the trial would result in a substantial likelihood of traumatic emotional or mental distress; and
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> (d) The court finds in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient guarantees of trustworthiness. In determining the trustworthiness of the statement, the court may consider the age and maturity of the child, the nature and duration of the abuse or offense alleged, factors which may detract from the declarant's credibility, information provided about the child's reliability based on the specific behavioral indicators described in § 13-1-411, or any other factor deemed appropriate.
>
> (2) The defendant shall be notified no later than ten (10) days before trial that an out-of-court statement as described in this section shall be offered in evidence at trial. The notice shall include a written statement of the content of the child's statement, the time the statement was made, the circumstances surrounding the statement which indicate its reliability and such other particulars as necessary to provide full disclosure of the statement.
>
> (3) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this section.

MISS. CODE ANN. § 13-1-403 (Supp. 1989).

[195] *Hall*, 539 So. 2d at 1340.

lowed into evidence statements made by the child to two social workers during their investigation of the charges.[196]

The Mississippi Supreme Court reversed and remanded,[197] holding that under Rule 802 of the Mississippi Rules of Evidence, hearsay testimony is admissible only "as provided by law."[198] The court stated that the Evidence of Child Sexual Abuse Act, under which the hearsay testimony was admitted, is not legally valid and accordingly not the law.[199] According to the court:

> The rules and standards by which evidence is adjudged competent for use in a trial are the concern of the department of government where trials take place: the judicial department. The authority to act upon that concern is similarly situated. That authority has become known as the rule-making power. However problematic the point may once have been, the rule-making power has become established as a permanent part of the authority of the Supreme Court of Mississippi.[200]

By enacting the Mississippi Rules of Evidence, the court noted that it "declared a codification of the hearsay rule and exceptions thereto."[201] In addition, the court stated, "[O]ur order implementing these Rules is the ultimate authoritative declaration that the making of rules of evidence, and particularly rules regulating the use of hearsay evidence, lies on judicial turf."[202] Therefore, the legislature was without authority to promulgate the Evidence of Child Sexual Abuse Act.[203] Being legally invalid, the Act "may not be regarded as 'law' within Rule 802."[204] The court referred the matter to the Advisory Committee on Rules to investigate and recommend whether the Rules should be amended to deal with hearsay evidence in child sexual abuse cases.[205]

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[196] *Id.* at 1340-41.

[197] *Id.* at 1349.

[198] *Id.* at 1341 (quoting MISS. R. EVID. 802).

[199] *Id.* at 1346.

[200] *Id.* at 1344-45.

[201] *Id.* at 1346.

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Id.* at 1347-48. In *Hall*, the court noted that the exception contained in Rule 803(2) would not apply. *Id.* at 1342. Rule 803(2) provides: "(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MISS. R. EVID. 803(2). Similarly the court declared that the exception in neither Rule 803(3) nor (4) would be applicable. *Hall*, 539 So. 2d at 1342. These exceptions state:

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

MISS. R. EVID. 803(3), (4).

However, while the court noted that none of the specific exceptions to the hearsay rule were applicable to the facts of the case, it did state that in certain situations, the prosecution might attempt to qualify such hearsay testimony for admissibility under the catch-all exception contained in Rule 803(24). *Hall*, 539 So. 2d at 1341-43. Rule 803(24) provides:

(24) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

MISS. R. EVID. 803(24).

However, the court noted that in order for hearsay to be admissible under Rule 803(24), the requirements of the rule must be met. *Hall*, 539 So. 2d at 1343. The court recognized that in this case, these requisites were not met. *Id.* Further, the court refused to apply any of the exceptions contained in Rule 804, noting that the child was not "unavailable" to testify as defined by Rule 804(2). *Id.* Rule 804 states:

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of his statement; or

(4) Is unable to be present or testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

The case of *Mitchell v. State*[206] involved a situation similar to that in *Hall*. In *Mitchell*, the defendant was indicted for fondling a five-year-old child.[207] Following a mistrial,[208] a second trial was held at which the judge allowed testimony by the victim's mother and her babysitter, both of which concerned statements made by the victim about the incident in question.[209] The trial court allowed this hearsay testimony based upon the "tender years" exception to the hearsay rule.[210]

The Mississippi Supreme Court reversed and remanded,[211] holding that the trial court erred in not determining the admissibility of the hearsay testimony under the Mississippi Rules of Evidence, which were in effect at the time of trial and which "abrogated evidentiary rules set out in caselaw."[212] As in *Hall*, the court noted that the legislature had enacted provisions dealing with this type of hearsay.[213] However, the court stated that "[s]uch action is at the core of the judicial function, and as such is separate and different from the legislative function."[214]

> A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

MISS. R. EVID. 804(a). Finally, the court noted that because the hearsay testimony was admitted, the defendant was denied a substantial right under Rule 103 and that he did not receive a fair trial. *Hall*, 539 So. 2d 1348.

Justice Hawkins strongly dissented in *Hall*, maintaining that the legislature did not exceed its constitutional authority by enacting the Evidence of Child Sexual Abuse Act. *Id.* at 1349 (Hawkins, J., dissenting). According to Hawkins, it was the court "which is trespassing into forbidden territory." *Id.*

[206] 539 So. 2d 1366 (Miss. 1989). The trial court sentenced the defendant, Steve Mitchell, to a term of five years imprisonment and also recommended that he undergo psychiatric counseling. *Mitchell*, 539 So. 2d at 1367.

[207] *Id.*

[208] *Id.* The mistrial was granted because at the first trial, the babysitter apparently became confused, continually testifying about incidents involving the defendant and other children. *Id.* at 1368.

[209] *Id.* at 1369.

[210] *Id.*; *see* Williams v. State, 427 So. 2d 100, 103 (Miss. 1983) (applying "tender years" exception to hearsay rule).

[211] *Id.* at 1374.

[212] *Id.* at 1369.

[213] *Id.* at 1371; *see supra* note 194.

[214] *Mitchell*, 539 So. 2d at 1371. The court noted that on remand the trial judge must determine the admissibility of the hearsay testimony under the exceptions of Rule 803, including the catchall exception of Rule 803(24). *Id.* The court also recognized that parts of the babysitter's testimony, in which she stated that the victim had told her of other occasions on which the defendant "had exposed himself to the [victim and other] children" fell within Rule 404(b). *Id.* at 1372. The court rejected the state's contention that such testimony was admissible to show the defendant's "lustful behavior toward

Finally, in *Leatherwood v. State*,[215] the defendant was convicted of the rape of an eleven-year-old female.[216] The trial judge allowed into evidence hearsay statements made by the victim concerning the incident.[217] The Mississippi Supreme Court again stated that the "tender years" exception formulated under Mississippi case law had been repealed by the Mississippi Rules of Evidence.[218] As the Rules contained no such exception, the court stated that on remand, the lower court must look to the Rules, including the catchall exception of Rule 803(24), to determine which of the victim's hearsay statements might be admissible.[219] In applying Rule 803(24), the court noted that the lower court must comply with the requirements of that rule, making the required findings as to the admissibility of each of the victim's statements.[220]

C. Miscellaneous Evidentiary Matters

In *Magee v. State*,[221] the Mississippi Supreme Court discussed the admissibility of identifications by witnesses for the state where the defendant maintains that the identification procedures employed were tainted.[222] In *Magee*, the defendant was convicted of the robbery of a package store.[223] One of the store's owners, Brenda Simmons, provided

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children in general." *Id.* According to the court, such testimony should be limited to instances between the defendant and the victim in order to demonstrate "the lustful, lascivious disposition of the defendant toward that particular victim." *Id.*

[215] 548 So. 2d 389 (Miss. 1989). The trial court sentenced the defendant, Alfred Dale Leatherwood, to death. *Leatherwood*, 548 So. 2d at 395.

[216] *Id.* at 390.

[217] *Id.* at 393.

[218] *Id.* at 398-99.

[219] *Id.* at 400-02. As in *Hall*, the court noted that the exceptions contained in Rule 803(2) and (3) would not be applicable. *Id.* at 399-400. The court also concluded that the victim's disclosures to a speech pathologist at her school, which included a handwritten letter implicating the defendant, would not be admissible under the catchall exception of Rule 803(24). *Id.* at 402. These disclosures followed earlier ones made to family members and physicians as well as medical examinations of the victim. *Id.* at 391-92. As to the subsequent disclosures to the speech pathologist, the court stated that "[t]here was no showing of need for such hearsay evidence, or that the evidence was 'more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.' " *Id.* at 402 (quoting MISS. R. EVID. 803(24)).

[220] *Id.* at 400-02.

[221] 542 So. 2d 228 (Miss. 1989). The defendant, Johnny Ray Magee, was sentenced as a habitual offender to a term of life imprisonment without parole. *Magee*, 542 So. 2d at 229.

[222] *Id.* at 231.

[223] *Id.*

the police with a description of one of the perpetrators.[224] On the basis of this description, the police picked up the defendant.[225] The next day, Simmons was unable to positively select the defendant out of a police lineup.[226] Later, however, she was able to select him from a group of pictures "without any hesitation whatsoever."[227] The defendant was the only person who appeared in both the line-up and the photographs.[228]

On appeal, the Mississippi Supreme Court affirmed the conviction.[229] As to the identification procedures, the court noted that, after reviewing the "totality of the circumstances,"[230] there was not a "substantial likelihood of irreparable misidentification."[231] The court noted that the victim did not originally identify another person and then change her mind, nor had she identified the defendant through "suggestive procedures" after originally stating that he was positively not the robber.[232]

III. Jury Instructions

In the past year the Mississippi Supreme Court handed down thirteen cases dealing with jury instructions. These cases fall into five basic categories: prejudicial supplemental instructions administered by a judge, circumstantial evidence instructions, malice aforethought instructions directing that malice must exist "but for an instant" prior to the commission of the act, a defendant's right to present his theory of the case to the jury, and lesser included offense instructions.

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[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] *Id.* at 237.

[230] *Id.* at 232 (quoting Neil v. Biggers, 409 U.S. 188 (1972)). The court noted that in the *Neil* case the United States Supreme Court set forth five factors to consider in determining "the likelihood of misidentification." *Id.* The factors are as follows:

(1) The opportunity of the witness to view the criminal at the time of the crime;

(2) The witness's degree of attention;

(3) The accuracy of the witness's prior description of the criminal;

(4) The level of certainty demonstrated by the witness at the confrontation; and

(5) The length of time between the crime and the confrontation.

Id. at 232 (citing *Neil*, 409 U.S. at 199).

[231] *Id.* at 233.

[232] *Id.*

In the case of *Shaw v. State*,[233] the defendant was tried for murder and convicted of manslaughter.[234] At some point, after being instructed and retiring, the jury requested further instruction on murder and manslaughter, and further instruction was given.[235] The defendant objected, contending that the giving of such instruction violated Criminal Rule of Circuit Court Practice 5.03,[236] which requires that jury instructions be filed at least twenty-four hours prior to the time at which the trial is set.[237] The defendant further contended that by giving the supplemental instructions and rereading a previously given instruction concerning manslaughter, the trial court wrongfully overemphasized and singled out the crime of manslaughter.[238]

The court found merit in neither contention, holding that although Rule 5.03 did require instructions to be filed prior to trial,[239] failure to follow the dictates of the rule does not constitute reversible error unless prejudice to the defendant results; none was found in the instant case.[240] The court further opined that in determining whether a particular point has been singled out through supplemental instructions, the manner in which the instruction was presented must be considered.[241] In the instant case, the trial court cautioned the jury that it was to consider the additional instructions along with the others and that they were not to be singled out.[242] The court also found that the particular instruction in question included information on everything from murder to manslaughter and did not in any way single out any particular crime.[243] Therefore, because of both the actual substance of and the circumstances under which the instructions were given, the giving of the supplemental instructions did not prejudice the defendant.[244]

The next category, circumstantial evidence instructions, was addressed in the case of *Simpson v. State*.[245] In *Simpson*, the defendant

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[233] 540 So. 2d 26 (Miss. 1989).
[234] *Shaw*, 540 So. 2d at 27.
[235] *Id.* at 28-29.
[236] *Id.* at 20.
[237] *Id.*
[238] *Id.*
[239] MISS. UNIF. CRIM. R. CIR. CT. P. 5.03.
[240] *Shaw*, 540 So. 2d at 30.
[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] *Id.*
[245] 553 So. 2d 37 (Miss. 1989).

was charged with and convicted of robbery.[246] Evidence presented against Simpson at trial was circumstantial.[247] On appeal, the appellant alleged that the trial court erred in rejecting his circumstantial evidence instruction.[248] The supreme court reversed and remanded, holding that circumstantial evidence instructions must *always* be given in cases where the record is devoid of a confession or there are no eyewitnesses.[249] The court stated that such instructions should be given by the court even where the defendant fails to request them.[250]

The two cases of *Blanks v. State*[251] and *Thornhill v. State*[252] dealt with jury instructions on malice aforethought and addressed exactly how far in advance malice must exist in order to constitute murder.[253] The prosecution in the *Blanks* and *Thornhill* cases submitted instructions stating that malice aforethought must exist "but for an instant" prior to the fatal act.[254] Although the court in *Blanks* condemned the use of such language, pointing out that it is, by its very nature, contradictory to malice aforethought and deliberate design, which are inherent parts of the crime of murder, it upheld the lower court's decision.[255] The *Blanks* court found that, though the language was somewhat misleading, the evidence presented, the prosecution's theory of the case, and the other full and correct instructions insured that there had been no prejudice to the defendant.[256] Similarly, in *Thornhill*, the court found that since the prosecution's theory of the case was that the defendant had plotted the decedent's murder, the instruction once again was harmless error and therefore did not warrant reversal.[257]

During 1989, the Mississippi Supreme Court handed down three

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[246] *Simpson*, 553 So. 2d at 37.

[247] *Id.* at 37. There had been no eyewitnesses or any confession to the burglary. *Id.*

[248] *Id.* at 39.

[249] *Id.* at 39 (citing Woodward v. State, 553 So. 2d 418, 431 (Miss. 1988), *cert. denied*, 109 S. Ct. 1767, *reh'g denied*, 109 S. Ct. 3179 (1989); Williamson v. State, 512 So. 2d 868, 880 (Miss. 1987); Keys v. State, 478 So. 2d 266 (Miss. 1985)).

[250] *Id.* at 39 (citing Peterson v. State, 518 So. 2d 632, 637-38 (Miss. 1987); Ranier v. State, 473 So. 2d 172, 174 (Miss. 1985)).

[251] 542 So. 2d 222 (Miss. 1989).

[252] No. 07-58677 (Miss. Nov. 22, 1989).

[253] *Thornhill*, No. 07-58677, slip op. at 5, 6; *Blanks*, 542 So. 2d at 227-28.

[254] *Thornhill*, No. 07-58677, slip op. at 5, 6; *Blanks*, 542 So. 2d at 227.

[255] *Blanks*, 542 So. 2d at 227-28.

[256] *Id.* The court noted that if the jury believed the prosecution's theory of the case, evidence presented would indicate that the defendant's "malice" had come into play quite some time before the killing of the victim. *Id.*

[257] *Thornhill*, No. 07-58677, slip op. at 5, 6. The prosecution's theory of the case was that the defendant lured the victim to his home in order to kill him. *Id.*

cases dealing with a defendant's right to present his theory of the case to the jury. The two cases of *Lenard v. State*[258] and *Sayles v. State*[259] were reversed where the defendants' instructions which were supported by the evidence were refused.[260] The court held that where such instructions are proposed by a defendant, they must be given, for it is imperative that a defendant be allowed to present his theory of the case to the jury.[261] However, in the case of *Layne v. State*, the court affirmed the trial court's refusal to give a defendant's self-defense instruction in a felony murder trial.[262] The court held that self-defense instructions were not available to persons accused of felony murder since the purpose of the rule is to deter even accidental killings that might occur in the course of another crime by holding the felon strictly liable.[263]

Five Mississippi cases during the past year fell into the instruction category of lesser included offenses. Four of these, *Mease v. State*,[264] *Gangl v. State*,[265] *Whitehurst v. State*,[266] and *Boyd v. State*[267] stood for the simple and well established principle that where there is evidence in the record to support a lesser included offense instruction, it is reversible error to refuse it.[268]

In the case of *McGowan v. State*,[269] the supreme court affirmed the trial court's failure to give a "lesser included offense instruction" where a defendant who was tried for aggravated assault assigned error

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[258] 552 So. 2d 93 (Miss. 1989).

[259] 552 So. 2d 1383 (Miss. 1989).

[260] *Sayles*, 552 So. 2d at 1390; *Lenard*, 552 So. 2d at 96-97.

[261] *Sayles*, 552 So. 2d at 1390; *Lenard*, 552 So. 2d at 95-96. The defendant in *Sayles* also contended that the instructions were confusing and couched entirely in terms of abstract principles of law. *Sayles*, 552 So. 2d at 1388. The court dismissed this contention, finding that the instruction did apply the facts to the law and further stated that when abstract instructions would not confuse or mislead the jury (as in this situation) they did not constitute reversible error. *Id.* at 1389-90.

[262] 542 So. 2d 237, 242-44 (Miss. 1989).

[263] *Layne*, 542 So. 2d at 243-44.

[264] 539 So. 2d 1324 (Miss. 1989).

[265] 539 So. 2d 132 (Miss. 1989).

[266] 540 So. 2d 1319 (Miss. 1989).

[267] No. 07-58545, slip op. at 4-7 (Miss. Oct. 18, 1989). It should also be noted that the supreme court decided the case of Avery v. State, 548 So. 2d 385 (Miss. 1989). This case dealt with the undisputed principle that the giving of a jury instruction depends largely upon whether or not there is credible evidence in the record to support it. *Id.* at 387.

[268] *Mease*, 539 So. 2d at 1327-28; *Gangl*, 539 So. 2d at 136; *Whitehurst*, 540 So. 2d at 1319; *Boyd*, No. 07-58545, slip op. at 4-7.

[269] 541 So. 2d 1027 (Miss. 1989).

in the court's refusal of his attempted murder instruction.[270] Apparently, the defendant wished for a "lesser included" attempted murder instruction because the penalty was lighter than that for aggravated assault.[271] The court found, however, that the defendant was not entitled to such an instruction because there was no view of the evidence under which the defendant could have been found guilty of one crime and innocent of the other. The elements of the crimes were virtually identical.[272] Therefore, the crime of attempted murder did not actually constitute a lesser included offense, and the instruction was rightfully denied by the trial court.[273]

IV. Voir Dire

A. Batson Challenges

In 1989 the Mississippi Supreme Court addressed many challenges to the process of jury selection and composition.[274] Several of these

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[270] *McGowan*, 541 So. 2d at 1027-29.

[271] *Id.*

[272] *Id.* at 1028-29.

[273] *Id.* at 1029. For other Mississippi cases dealing with the issue of jury instructions in criminal matters, see Strickland v. State, No. 07-58493, slip op. at 6-11 (Miss. Dec. 20, 1989) (standard for granting peremptory instruction, directed verdict, new trial, or JNOV is, after considering all evidence which is favorable to state, with all inferences favorable to state, if evidence is sufficient to support verdict of guilty, instruction should be granted); Ford v. State, 555 So. 2d 691, 697 (Miss. 1989) (jury instruction regarding lesser included offense was properly refused where reasonable jury could not find accused guilty of lesser offense); Dennis v. State, 555 So. 2d 679, 683 (Miss. 1989) (trial court did not properly refuse jury instructions concerning non-flight); Shell v. State, 554 So. 2d 887, 900-01 (Miss. 1989) (allegedly "brief" jury instructions found sufficient); Benson v. State, 551 So. 2d 188, 193-94 (Miss. 1989) (peremptory instruction should be refused if there is enough evidence to support verdict); Gray v. State, 549 So. 2d 1316, 1324 (Miss. 1989) (circumstantial evidence instruction is not required where direct evidence of the crime has been introduced); Avery v. State, 548 So. 2d 385, 386-88 (Miss. 1989) (where defendant produces sufficient evidence of entrapment for rational jury to find for him, court must allow defendant's entrapment instruction); Butler v. State, 544 So. 2d 816, 818-19 (Miss. 1989) (failure to object to jury instruction at trial bars right to challenge it on appeal); Magee v. State, 542 So. 2d 228, 234-35 (Miss. 1989) (accomplice instruction is proper where there is sufficient evidence to support it); Moffett v. State, 540 So. 2d 1313, 1318-19 (Miss. 1989) (where there is no evidence to support proposed jury instructions, instruction should not be given); Griffin v. State, 540 So. 2d 17, 21 (Miss. 1989) (where supported by evidence, lesser included offense instruction must be given).

[274] Turner v. State, No. 03-82, slip op. at 6, 29 (Miss. Nov. 22, 1989) (in capital case, there is no constitutional right to inform jury of possibility of parole or to voir dire jury on understanding of parole; state may legitimately strike jurors who oppose imposition of death penalty); Dennis v. State, 555 So. 2d 679, 681 (Miss. 1989) (*Batson* claim rejected where defendant failed to offer proof that prosecutor actually exercised his peremptory

challenges[275] involved claims of purposeful discrimination in the selection of the jury in violation of the directives enunciated in *Batson v. Kentucky*.[276] *Batson* requires a defendant, in order to make out a prima facie case of purposeful discrimination in the selection of a jury, to establish:

(1) that he is a member of a cognizable racial group;

(2) that the prosecutor has, in fact, exercised peremptory challenges to remove from the venire members of the defendant's race; and

(3) that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the jury on account of their race.[277]

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challenges in racially discriminatory manner); Carr v. State, 555 So. 2d 59, 59-60 (Miss. 1989) (while juror should have been excused for cause because of certain sympathetic remarks concerning victim of crime, error at trial court level was not reversible error because defendant suffered no actual prejudice); Shell v. State, 554 So. 2d 887, 891-92 (Miss. 1989) (en banc) (where nine of 42 members of capital murder jury venire had relatives who had been murdered, but seven did not serve on jury and two *could* have been terminated by peremptory challenges of defense counsel, "statistical aberration" did not prevent rendering of fair trial because trial court determined that venirepersons would be "fair and impartial"); Benson v. State, 551 So. 2d 188, 191-92 (Miss. 1989) (finding by trial court that prosecutor's explanations concerning use of peremptory challenges on minority persons were race-neutral should be accorded "great deference," and thus *Batson* objection was without merit); Davis v. State, 551 So. 2d 165, 169-72 (Miss. 1989) (defense failed to rebut neutral nonracial explanation for peremptory challenges, and thus *Batson* claim was rejected); Coleman v. State, 545 So. 2d 3, 4 (Miss. 1989) (reversal not required where prospective jurors related to law enforcement personnel did not actually serve on jury); Conerly v. State, 544 So. 2d 1370, 1370-71 (Miss. 1989) (en banc) (where defendant established prima facie case of *Batson* "purposeful discrimination" in jury selection, trial court was obligated to seat juror unless prosecutor could state valid race-neutral reason for exclusion); Shaw v. State, 540 So. 2d 26, 27-28 (Miss. 1989) (where juror's excusal for cause did not deprive defendant of his right to fair and impartial jury or in any other way prejudice him, there is no reversible error); McDonald v. State, 538 So. 2d 778, 780 (Miss. 1989) (there was no *Batson* violation where state provided proper racially neutral reason for exclusion of black jurors); Adams v. State, 537 So. 2d 891, 892-95 (Miss. 1989) (deputy circuit clerk's failure to follow proper procedure under jury selection statutes was reversible error).

[275] Dennis v. State, 555 So. 2d 679, 681 (Miss. 1989) (*Batson* claim alleged); Benson v. State, 551 So. 2d 188, 191-92 (Miss. 1989) (same); Davis v. State, 551 So. 2d 165, 169-70 (Miss. 1989) (same); Conerly v. State, 544 So. 2d 1370, 1370-71 (Miss. 1989) (same).

[276] 476 U.S. 79 (1986). The Mississippi Supreme Court adopted the *Batson* guidelines of the United States Supreme Court for challenging the prosecutor's allegedly discriminatory use of peremptory challenges in the case of Williams v. State, 507 So. 2d 50, 52 (Miss. 1987). *See generally 1987 Mississippi Supreme Court Review*, 57 MISS. L.J. 427, 498-505 (1987) (discussion of application of *Batson* in Mississippi).

[277] *Batson*, 476 U.S. at 96; *see also* Taylor v. State, 524 So. 2d 565, 566 (Miss. 1988) (*Batson* test recounted).

Once the prima facie showing has been made, the burden shifts to the state to come forward with a neutral explanation for challenging the jurors.[278]

In *Davis v. State*,[279] the Mississippi Supreme Court held that the trial judge's finding that the reasons enumerated by the state for exercise of its peremptory challenges to strike black jurors were acceptable and not discriminatory, was not clearly erroneous.[280] The court also rejected the defendant's argument that he was not allowed to rebut the reasons for the peremptory challenges supplied by the state and that if he had been allowed to do so, he could have shown that the reasons were not well founded and had a discriminatory purpose.[281] The court instead pointed to the fact that Davis was given his *opportunity* to "make his record," but failed to do so by alleging only in general terms that the strikes exercised violated *Batson*.[282] The *Davis* court concluded that in the absence of an actual proffer of evidence in rebuttal concerning the issue, the court could not reverse on this point.[283] Thus it would seem prudent for attorneys alleging *Batson* claims, who have valid points to make in rebuttal of the prosecutor's neutral nonracial explanation for the peremptory challenges, to make specific proffers of evidence with regard to this issue, because a stated desire to be heard in rebuttal made in conjunction with a weak suggestion of rebuttal will not be enough, according to the *Davis* court.[284]

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[278] *Batson*, 476 U.S. at 97. The prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged members of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to defendant because of their shared race. *Id.* at 97-98.

[279] 551 So. 2d 165 (Miss. 1989). The defendant, Gregory Davis, had been indicted for capital murder. *Davis*, 551 So. 2d at 167.

[280] *Id.* at 171-72. Race-neutral reasons found acceptable by the trial court with regard to peremptory challenges included a change of mind concerning views on the death penalty (once the juror found out he could be excused from service if he was opposed to the death penalty), the appearance of hostility during voir dire, and the age of the juror in a trial expected to last over a week. *Id.* at 170-71.

[281] *Id.* at 172. After the state had finished putting forward its reasons for challenging the minority jurors, counsel for Davis asked to "make a record on this." *Id.* The trial court replied, "Well what record do you want to make? It's what the prosecutor considers their reasons." *Id.* Defense counsel then alleged generally that the reasons were inadequate under *Batson*. *Id.*

[282] *Id.*

[283] *Id.* The court added that the procedure followed by the trial court in *Davis* had been previously allowed by the court in Johnson v. State, 529 So. 2d 577 (Miss. 1988), and in Chisolm v. State, 529 So. 2d 635 (Miss. 1988); thus there was no procedural error by the trial court. *Davis*, 551 So. 2d at 172.

[284] *Davis*, 551 So. 2d at 172.

One other *Batson* case worthy of note was that of *Dennis v. State*,[285] wherein the court held that the defendant had failed to establish a prima facie case of racial discrimination in the exercise of peremptory challenges.[286] The court found that the defendant had not met his burden of proof with regard to the third part of the *Batson* test, requiring that all the facts and circumstances indicate an inference of purposeful discrimination.[287] In examining the facts and circumstances surrounding the case, the court noted: (1) that defense counsel, in attempting to raise *Batson* discrimination, merely stated that the prosecutor had exercised five of his seven peremptory challenges against blacks, (2) that both the prosecutor and the defendant had several challenges left, (3) that numerous potential black jurors were left uncalled and one black juror was in the box, and (4) that the victim of the crime, as well as the defendant, was black.[288]

B. General Challenges

The Mississippi Supreme Court dealt with several other miscellaneous challenges to the voir dire process.[289] In *Adams v. State*,[290] the deputy circuit clerk handling jury selection duties unilaterally struck twenty-nine names from the venire facies for various reasons, including age and prior jury service in the county within the preceding two years.[291] Prior to trial, the defendant filed a motion to strike jury ve-

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[285] 555 So. 2d 679 (Miss. 1989).

[286] *Dennis*, 555 So. 2d at 684. The defendant, Kenneth Dennis, had been convicted for the rape and kidnapping of a young female student. *Id.* at 680. Specifically, the court held that the defendant had failed to prove that the government's use of peremptory challenges and any other relevant circumstances raised an inference that the government purposefully excluded jurors on the basis of their race, as is required under the third prong of the *Batson* test. *Id.*

[287] *Id.*

[288] *Id.*

[289] Carr v. State, 555 So. 2d 59, 59-60 (Miss. 1989) (failure to excuse juror for cause did not result in actual prejudice to defendant); Shell v. State, 554 So. 2d 887, 889-90 (Miss. 1989) (en banc) (fair trial rendered despite abnormal presence of persons who had relatives murdered on capital murder jury venire); Benson v. State, 551 So. 2d 188, 190-91 (Miss. 1989) (defendant was not entitled to mistrial when potential juror stated before entire panel that he had read that defendant was charged as habitual offender); Adams v. State, 537 So. 2d 891, 892-95 (Miss. 1989) (deputy circuit clerk struck persons from jury list in violation of MISS. CODE ANN. § 13-5-25 (Supp. 1989)).

[290] 537 So. 2d 891 (Miss. 1989). The defendant, James Adams, was indicted and convicted on a charge of armed robbery. *Adams*, 537 So. 2d at 892.

[291] *Id.* at 892-93. The deputy circuit clerk's testimony concerning his actions with regard to the jury list was as follows:

Q. Mr. Self, you notice that some of the names on that [jury] list have

nire based on the actions of the deputy circuit clerk in striking persons from the jury list without court authority and without notifying these persons that their names had been drawn for jury duty or requiring that they claim their statutory privilege of exemption. However, the motion was overruled.[292] The Mississippi Supreme Court reversed and remanded, holding that the actions of the deputy circuit clerk were clearly contrary to the language of section 13-5-25 of the Mississippi Code, which provides that a person who is over sixty-five or who may have served on a jury within the preceding two years is exempt only "if he claims the privilege."[293] The *Adams* court added that such a person is eligible for jury duty, has every right to serve if called and selected, and must be summoned the same as other prospective jurors when his or her name is called.[294]

In *Benson v. State*,[295] the defendant was indicted and convicted of robbery and adjudged a habitual offender under section 99-19-81 of the Mississippi Code.[296] The defendant argued that the trial court erred in

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scratches by them, do they not?

A. Yes, sir.

Q. Can you explain that, please?

A. Some of those people are people who were deceased, moved away, or over sixty-five—you know, the Sheriff's not able to locate—or, you know, for medical reasons.

Q. Can you describe the process of how those names get scratched off that list? Is it done by you or the judge or the Sheriff?

A. I do it. I scratch them off.

Q. Are some of those people that are scratched off that list people who have served previously?

A. Yes, sir. Who they are and how many, I don't know, but some of them are.

Id. at 893.

[292] *Id.* at 892.

[293] *Id.* at 893-95. Section 13-5-25 of the Mississippi Code provides, in relevant part, that:

> Every citizen over sixty-five (65) years of age, and everyone who has served on the regular panel as a juror in the actual trial of one or more litigated cases within two years, shall be exempt from service, if he claims the privilege. No qualified juror shall be excluded because of any such reasons [being over sixty-five or having served on a jury within two years], but the same shall be a personal privilege to be claimed by any person selected for jury duty.

MISS. CODE ANN. § 13-5-25 (Supp. 1989).

[294] *Adams*, 537 So. 2d at 894. In addition, the *Adams* court stated that no one has the authority to exempt such a person from service unless the prospective juror himself claims the privilege and asks to be excused. *Id.* The court noted that, while Mississippi's jury selection laws are, in fact, directory and not mandatory, this was a case requiring reversal because the clerk did that which the law expressly prohibits. *Id.* at 894-95.

[295] 551 So. 2d 188 (Miss. 1989).

[296] *Benson*, 551 So. 2d at 190. The defendant was Troby Devon Benson. *Id.*

not granting a mistrial and a new venire panel when, during voir dire, a potential juror stated before the entire panel that the defendant was charged as "a habitual offender."[297] The Mississippi Supreme Court affirmed, holding that where "voir dire on the part of the [trial] court clearly discloses that no juror felt or believed the statement made . . . would prejudice him or prevent him from being a fair and impartial juror,"[298] then it was not an abuse of the trial court's discretion to overrule a motion for mistrial and a new jury panel.[299]

Although not selected for textual discussion, one other case came before the court dealing with the random composition of the jury

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[297] *Id.* at 190-91. During voir dire by the State, the following exchange, which served as the basis of defense counsel's motion for mistrial, occurred in the presence of the entire venire panel:

> Q. . . . Is there anyone here who having heard my additional questions and thought about what you heard from the Judge, who could now say, "Well, yes, I have heard something about this case"?
>
> A. (response by juror).
>
> Q. All right, sir. This would be—
>
> A. (James Hitt), James Hitt. It was in the—just a brief sketch in the paper came out, and I read that, a habitual offender.

Id. at 191.

[298] *Id.* Specifically, the trial court questioned the jurors as follows:

> Let me ask all members of the jury this question . . . . Is there anybody on the jury that would be influenced by what Mr. Hitt had read in the paper? Would this have any bearing or influence on any member of the jury from the statement Mr. Hitt just stated?
>
> A. (No juror response).
>
> Q. Mr. Benson is here to be tried, despite what the paper says, he's here to be tried on a robbery charge, as I have stated to you. And where the paper gets their information, I don't know. Is there anybody who because this was published in the paper would have any prejudice arise out of it or have it influence you in any way in your determining his guilt or innocence on the charge robbery we're here to try today? Is there anybody that this would have any influence or bearing on? If so, please raise your hand.
>
> A. (No juror response).
>
> The Court:
>
> Let the record show that every member of the jury assures the court that this would have no influence or bearing on their decision.

Id.

[299] *Id.* (quoting Robinson v. State, 253 So. 2d 398, 402 (Miss. 1971)). The *Benson* court added that the trial court followed a course of action identical to the one employed in Robinson v. State, 253 So. 2d 398 (Miss. 1971), wherein the *Robinson* court stated that generally these matters are left to the discretion of the trial court, unless clear abuse is evident. *Benson*, 551 So. 2d at 191. The court pointed out that after questioning jurors in the case, the trial judge made an explicit finding that each could disregard the potential juror's remark and decide the case on the evidence. *Id.*

venire.[300]

V. Sentencing

The Mississippi Supreme Court rendered several opinions concerning the sentencing of a criminal defendant.[301] These decisions are broadly divided into the following categories: death penalty,[302] recidivism,[303] and a judge's authority to sentence.[304]

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[300] *See* Shell v. State, 554 So. 2d 887 (Miss. 1989) (en banc). In *Shell*, the defendant on appeal argued that the "statistical aberration" which resulted in nine members on a capital murder jury venire who had had a close relative murdered required ameliorative action by the trial court and prevented the defendant from receiving a fair trial. *Id.* at 891. The Mississippi Supreme Court affirmed, holding that while nine of 42 members of a capital murder jury venire did have relatives who had been murdered, seven did not serve on the jury, two *could have* been eliminated by defense counsel's remaining peremptory challenges, and the trial court was satisfied as to their fairness and impartiality; thus, the "statistical aberration" did not prevent the rendering of a fair trial. *Id.* at 891-92. The court distinguished on a factual basis the case of Mhoon v. State, 464 So. 2d 77, 80 (Miss. 1985), wherein 12 of 39 venire persons were either policemen or related by blood or marriage to a current or former policemen. (The victim of the crime was a policeman.) *Shell*, 554 So. 2d at 890. The *Shell* court pointed out that in *Mhoon* the jury consisted of six of the 12 and defense counsel had exhausted all peremptory challenges, with the result that the "statistical aberration" *produced* an unfair trial. *Id.*; *see supra* note 274.

[301] *See infra* notes 305-34 and accompanying text.

[302] *See infra* notes 305-15 and accompanying text.

[303] *See infra* notes 316-34 and accompanying text. This group of recidivist cases will not be discussed textually.

[304] *See* Trotter v. State, 554 So. 2d 313, 315 (Miss. 1989) (although defendant who enters guilty plea is generally precluded from appealing to Mississippi Supreme Court, defendant may appeal from *sentence* imposed pursuant to guilty plea); Evans v. State, 547 So. 2d 38, 40 (Miss. 1989) (where defendant in rape case waives right to jury trial at both guilt and sentencing phases, trial judge as trier of fact had same authority as jury under Miss. Code Ann. § 97-3-65 (1972) and could sentence defendant to life imprisonment); Gardner v. State, 547 So. 2d 806, 808 (Miss. 1989) (where circuit court imposes sentence *in futuro* prior to receiving mandate from Mississippi Supreme Court, there is no violation of either Miss. Sup. Ct. R. 41(a) or Miss. Unif. Crim. R. Cir. Ct. P. 6.01, and sentence becomes effective as of date mandate is filed with circuit court); Hentz v. State, 542 So. 2d 914, 917-18 (Miss. 1989) (since sentencing constitutes separate and full trial, defendant must be provided with any and all discovery to which he is entitled under Miss. Unif. Crim. R. Cir. Ct. P. 6.04); McGilvery v. State, 540 So. 2d 41, 42 (Miss. 1989) (in sentencing defendant, trial judge should document defendant's criminal record so that it can be meaningfully reviewed upon appeal); State v. Willis, 539 So. 2d 1043, 1045 (Miss. 1989) (where sentencing order is ambiguous, it will be resolved in favor of accused).

A. *Death Penalty*[305]

In *Williams v. State*,[306] the defense attorney, during closing argument at the sentencing phase of the defendant's trial,[307] referred to an execution which had occurred in the state the previous summer.[308] The state objected and specifically interjected for the first time the name of Jimmy Lee Gray as the person to whom the defense was referring.[309] When he continued his closing, the defense attorney then explicitly referred to the Gray case by name.[310] On the theory that the defense had opened the door, the district attorney, on closing, proceeded to discuss the Gray case, the lengthy appeals process, and the possibility of parole if the defendant were given a life sentence.[311]

On the petition for rehearing, the defendant argued that the Mississippi Supreme Court failed earlier to address an assignment of error which asserted reversible error—that is, that the district attorney improperly commented on the possibility of parole and appellate review of death sentences during his closing argument at the sentencing phase of the trial.[312]

The Mississippi Supreme Court found that the state's reference to a possibility of parole constituted an influence of passion, prejudice, or other arbitrary factors proscribed by section 99-19-105(3)(a) of the Mississippi Code.[313] The court rejected the State's opened door/invited error argument, finding that the district attorney's closing was not a

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[305] Besides the case which is treated textually in this section, the court also decided Johnson v. State, 547 So. 2d 59 (Miss. 1989). In *Johnson*, the court held that a prior conviction which has been vacated and dismissed is not a proper aggravating circumstance for a jury's consideration in imposing the death sentence. *Id.* at 60-61 (citing Johnson v. Mississippi, 108 S. Ct. 1981 (1988)).

[306] 544 So. 2d 782 (Miss. 1987), *modified on reh'g* (1989). Only the sections of the opinion dealing with the petition for rehearing are treated here. *See Williams*, 544 So. 2d at 783-93.

[307] *Id.* at 794. The defendant, Jessie Derrell Williams, had been convicted of capital murder. *Id.* at 783.

[308] *Id.* at 794.

[309] *Id.*

[310] *Id.*

[311] *Id.* at 795. The district attorney stated that Jimmy Lee Gray was able to kill again because he was paroled from a life sentence and that, similarly, if Williams were given a life sentence, rather than death, he too would kill again. *Id.* He further alluded to the fact that Gray's appeal of his death sentence lasted seven years and was heard by 58 different judges. *Id.*

[312] *Id.* at 793-94.

[313] *Id.* at 799; *see* MISS. CODE ANN. § 99-19-105(3)(a) (Supp. 1989) ("With regard to sentence, the court shall determine: (a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor . . . .").

reiteration of issues raised by the defense and that the discussion of the possibility of parole was not invited by the defense attorney's closing remarks.[314] In addition, the court held that the state's reference to appellate review of capital sentences constituted reversible error, in that the district attorney's statements "might well have lessened the juror's sense of responsibility."[315]

B. Recidivism[316]

In *Jefferson v. State*,[317] the defendant was convicted of burglary,

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[314] *Williams*, 544 So. 2d at 797-99. The court cited Caldwell v. Mississippi, 472 U.S. 320, 337 (1985), for the proposition that on closing there must be a rational link between statements made by the defense and any response by the prosecution. *Williams*, 544 So. 2d at 797. The court found that in the case at bar no such rational link existed. *Id.* The court also cited Booker v. State, 511 So. 2d 1329 (Miss. 1987), in which the court discussed the invited error doctrine. *Williams*, 544 So. 2d at 797. *Booker* held that "if the prosecution's remarks were 'invited,' and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction." *Booker*, 511 So. 2d at 1331. The court determined that in the instant case the state's remarks did not reiterate issues raised by the defense and were not invited by anything Williams's attorney argued. *Williams*, 544 So. 2d at 797. The court further questioned the continued validity of the opened door/invited error doctrine in the context of capital sentencing in light of the Supreme Court's decision in *Caldwell*. *Id.* at 797.

The court found the case at bar to be controlled by Williams v. State, 445 So. 2d 798 (Miss. 1984), even though *Williams* was decided after the trial of the instant case. *Williams*, 544 So. 2d at 798. In *Williams*, the court reversed the defendant's death sentence, finding that references to parole and appellate review at the sentencing phase of a trial were proscribed by section 99-19-105(3)(a) of the Mississippi Code. *Williams*, 445 So. 2d at 813; *see also* Wiley v. State, 449 So. 2d 756, 761-63 (Miss. 1984) (prosecutor impermissibly commented on reviewability of death sentence).

[315] *Williams*, 544 So. 2d at 802 (citing Wiley v. State, 449 So. 2d 756 (Miss. 1984); Howell v. State, 411 So. 2d 772 (Miss. 1982)). The court held that Williams's single objection to the district attorney's closing remarks properly preserved for review both the statements regarding parole and those concerning the appellate review of capital sentencing. *Id.* at 799-800 (citing Caldwell v. Mississippi, 472 U.S. 320, 340 (1985); Booker v. State, 449 So. 2d 209 (Miss. 1984); Williams v. State, 445 So. 2d 798, 810 (Miss. 1984); Caldwell v. State, 443 So. 2d 806 (Miss. 1983); Hill v. State, 432 So. 2d 427 (Miss. 1983); Culberson v. State, 379 So. 2d 499, 506 (Miss. 1980); Voyles v. State, 362 So. 2d 1236 (Miss. 1978)).

[316] Recidivist cases are generally controlled by MISS. CODE ANN. § 99-19-81 (Supp. 1989) and MISS. UNIF. CRIM. R. CIR. CT. P. 6.04. *See* Hoover v. State, 552 So. 2d 834, 837 (Miss. 1989) (jury verdict of life in sentencing phase of capital murder trial has no effect upon trial court's authority subsequently to conduct recidivism hearing and thereby impose enhanced sentence); Keys v. State, 549 So. 2d 949, 951 (Miss. 1989) (where defendant enters guilty plea, no separate sentencing hearing to determine habitual offender status is required).

[317] 556 So. 2d 1016 (Miss. 1989).

and after being adjudged a habitual offender, was sentenced to seven years imprisonment without parole.[318] In finding habitual offender status, the circuit court relied on two previous convictions for grand larceny.[319] The grand larceny convictions arose in 1981 after the defendant was indicted for two burglaries.[320] A few weeks later, the defendant appeared before the circuit court and asked to withdraw his plea of not guilty to burglary and instead to enter a plea of guilty to the related offense of grand larceny.[321] Accepting his pleas, the court found the defendant guilty of grand larceny in both cases.[322]

On appeal to the Mississippi Supreme Court, the defendant argued that as he was not indicted in 1981 for grand larceny, the two convictions for that crime were impermissibly used for enhancement of his present sentence.[323] He contended that grand larceny was a separate and distinct crime from burglary[324] and challenged the jurisdiction of the circuit court in 1981, maintaining that the prior convictions were facially irregular.[325]

Initially agreeing that burglary is a separate and distinct crime from grand larceny,[326] and acknowledging that a criminal defendant generally has a right to indictment,[327] the court held that by pleading

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[318] *Jefferson*, 556 So. 2d at 1017. Lester Lee Jefferson was convicted by jury in the Circuit Court of Bolivar County for the burglary of a business. *Id.*; *see* MISS. CODE ANN. § 97-17-33 (1972).

[319] *Jefferson*, 556 So. 2d at 1017.

[320] *Id.* Jefferson was indicted for two separate burglaries occurring on the same day of two automobiles which belonged to the same person. *Id.*

[321] *Id.* at 1017-18; *see* MISS. UNIF. CRIM. R. CIR. CT. P. 4.03.

[322] *Jefferson*, 556 So. 2d at 1018.

[323] *Id.*

[324] *Id.* At the recidivism hearing, Jefferson objected to the state's offer of the two grand larceny convictions. *Id.* Although the circuit court questioned whether it had possessed the authority in 1981 to accept guilty pleas to grand larceny when the indictments were for burglary, it concluded that Rule 4.03 authorized it to accept a guilty plea to a "lesser or *related* offense." *Id.*

[325] *Id.*

[326] *Id.*; *see* Fournier v. State, 96 Miss. 417, 50 So. 502, 502 (1909) (indictment which charged burglary will not support conviction for larceny). The court determined at the outset that because Jefferson was appealing on a question of law, no evidentiary hearing was necessary and that Phillips v. State, 421 So. 2d 476 (Miss. 1982), was inapplicable. *Jefferson*, 556 So. 2d at 1018. *Phillips* held that the merits of a defendant's prior convictions which are being used to enhance sentencing may not be retried at the recidivism hearing. *Phillips*, 421 So. 2d at 481. Instead, the defendant must proceed under the Mississippi Uniform Collateral Post-Conviction Relief Act. *Id.*; *see* Moore v. State, 508 So. 2d 666, 669 (Miss. 1987) (prior felony convictions properly used for enhancement where convictions facially indicated that defendant's pleas were knowing and voluntary).

[327] *Jefferson*, 556 So. 2d at 1018. The court stated that article 3, section 27 of the

guilty to grand larceny, the defendant effectively waived his right to be indicted for that crime.[328] In so holding, the court overruled *Box v. State*.[329] The court rejected the defendant's argument that in 1981 the

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Mississippi Constitution gives to one accused of committing a crime the right to be indicted. *Id.* (citing MISS. CONST. art. 3, § 27); *see also* MISS. UNIF. CRIM. R. CIR. CT. P. 2.05.

[328] *Jefferson*, 556 So. 2d at 1018-19. The court noted that the entrance of a guilty plea also effectuates a waiver of a defendant's right against self-incrimination; the right to confront and cross-examine state witnesses; the right to trial by jury; the right that the state prove every element of the crime beyond a reasonable doubt; and defects or insufficiencies in the indictment, including the defendant's right to claim he is not the named person in the indictment. *Id.* at 1019 & nn.3-6 (citing Williams v. State, 512 So. 2d 666, 672 (Miss. 1987); Thomas v. State, 472 So. 2d 425, 426 (Miss. 1985); Houston v. State, 461 So. 2d 720, 724 (Miss. 1985); Phillips v. State, 421 So. 2d 476, 479-83 (Miss. 1983); Wood v. State, 354 So. 2d 1122, 1124 (Miss. 1978); Anselmo v. State, 312 So. 2d 712 (Miss. 1975); Jones v. State, 244 So. 2d 1, 2 (Miss. 1971); Alexander v. State, 226 So. 2d 905, 909 (Miss. 1969); MISS. UNIF. CRIM. R. CIR. CT. P. 3.03(3)(c)).

The court also noted that a defendant can waive his right to indictment by requesting a lesser offense instruction. *Id.* at 1020. For a lesser offense instruction to be available, the court held that the lesser offense and the crime for which the defendant has been indicted must arise from a common nucleus of operative facts. *Id.*; *see* McGowan v. State, 541 So. 2d 1027, 1029 (Miss. 1989) (defendant may not get lesser offense instruction "where the evidence that proves his guilt of the lesser offense necessarily proves his guilt of the principal charge"); Whitehurst v. State, 540 So. 2d 1319, 1327 (Miss. 1989) (trial court should have granted defense instruction regarding lesser offense of negligent manslaughter by operation of vehicle under influence of intoxicating liquor); Gangl v. State, 539 So. 2d 132, 135-36 (Miss. 1989) (where there is evidence to support lesser offense instruction, upon request, defendant is entitled to such instruction); Griffin v. State, 533 So. 2d 444, 447-48 (Miss. 1988) (in trial for rape, court committed reversible error in refusing lesser offense instruction on simple assault). The court stated that grand larceny is substantially related to burglary, that in the instant case, each larceny arose from a common nucleus of operative fact, and that if Jefferson had been tried on the burglary charges, he could have requested a lesser offense instruction for grand larceny. *Jefferson*, 556 So. 2d at 1020.

> If . . . Jefferson could have been tried and convicted of larceny, it would . . . follow that he could enter a valid and enforceable guilty plea to larceny. If the circuit court had jurisdiction to adjudge Jefferson guilty of grand larceny, it . . . had jurisdiction to accept his guilty plea, adjudge him guilty, and impose sentence.

Id.

The court determined, however, that subject matter jurisdiction and failure to include in the indictment an essential element of a crime are never waived by a guilty plea. *Id.* at 1019; *see* Durr v. State, 446 So. 2d 1016, 1017 (Miss. 1984) (defendant's failure to demur to indictment did not constitute waiver); Maxie v. State, 330 So. 2d 277, 278 (Miss. 1976) (same).

[329] *Jefferson*, 556 So. 2d at 1021. The court stated that in Box v. State, 241 So. 2d 158 (Miss. 1970), the defendant was indicted for attempted armed robbery. *Jefferson*, 556 So. 2d at 1021. He then pled guilty to a lesser offense. *Id.* On appeal, the *Box* court rejected the State's argument that the defendant had waived his right to be indicted for

circuit court lacked jurisdiction, stating that "[t]he circuit courts of this state have *subject matter* jurisdiction of prosecutions of the criminal offense of grand larceny."[330] The court found that any right the defendant may have had not to be prosecuted for grand larceny was personal, not jurisdictional, and as such was subject to waiver.[331] The court stated that "[o]nce the indictment has been served on the defendant, a court having subject matter jurisdiction is empowered to proceed. A subsequent event such as a guilty plea to a lesser related offense in no way ousts the court of personal jurisdiction."[332]

In dissent, Justice Hawkins argued that where a defendant waives indictment, article 3, section 27 of the Mississippi Constitution mandates that the district attorney file an information.[333] Justice Hawkins opined that in the case at bar, where there was neither an indictment nor an information, the circuit court overstepped its constitutional authority even though the defendant had expressly waived indictment.[334]

VI. STATUTES

In 1989, the Mississippi Supreme Court rendered several opinions involving the interpretation and construction of certain Mississippi statutes concerning criminal law and procedure.[335] In *Pennock v.*

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the lesser offense. *Id.*

[330] *Jefferson*, 556 So. 2d at 1020 (citing MISS. CODE ANN. § 9-7-81 (1972)).

[331] *Id.* at 1021 (discussing Johnson v. State, 512 So. 2d 1246 (Miss. 1987); Williams v. State, 459 So. 2d 777 (Miss. 1984)).

[332] *Id.*

[333] *Id.* at 1022-23 (Hawkins, J., dissenting) (citing MISS. CONST., art. 3, § 27; MISS. UNIF. CRIM. R. CIR. CT. P. 4.03).

[334] *Id.* at 1026 (Hawkins, J., dissenting).

[335] *See* Fleming v. State, 553 So. 2d 505, 506 (Miss. 1989) (Mississippi Supreme Court lacked jurisdiction to review merits of appeal where appellant's "Motion for Transcripts of Sentencing and Other Court Records" was neither filed as part of motion under Uniform Post-Conviction Collateral Relief Act nor raised as part of direct appeal from conviction); Brown v. State, 552 So. 2d 109, 110-12 (Miss. 1989) (defendant was in "lawful custody" at time of alleged jail escape and deputy sheriff was "authorized" to trust prisoner to leave within meaning of MISS. CODE ANN. § 97-9-49(2) (1972) so that proper application of statute would have limited punishment to jail period not exceeding six months added to original sentence); Pennock v. State, 550 So. 2d 410, 412-14 (Miss. 1989) (under MISS. CODE ANN. § 97-11-125 (Supp. 1989), embezzlement is wrongful conversion of property *lawfully* possessed by person charged "by virtue of his [or her] office or employment," and does not encompass outright theft); Gray v. State, 549 So. 2d 1316, 1324-25 (Miss. 1989) (where two statutes deal with same criminal act, state may prosecute under either statute if indictment is unequivocal); Keeton v. State, 549 So. 2d 960, 961 (Miss. 1989) (consent was not necessary element of offense of fornication forbidden by reason of blood relationship under MISS. CODE ANN. § 97-29-5 (1972)); Leatherwood v.

State,[336] the defendant was indicted on a charge of embezzlement under section 97-11-25 of the Mississippi Code,[337] after repeatedly forging the name of her blind peer counselor to bogus vouchers and illegally obtaining from the state auditor checks payable to fictitious or ineligible vocational rehabilitation clients.[338] After her conviction, the defendant argued that she had not violated section 97-11-25 because the money had not come into her possession "by virtue of [her] office or employment" within the meaning of the statute—that is, she had

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State, 548 So. 2d 389, 402-03 (Miss. 1989) (where defendant convicted of capital rape, maximum punishment is life imprisonment unless jury finds that defendant meets one of conditions contained in MISS. CODE ANN. § 99-19-101(7) (Supp. 1989)); Harden v. State, 547 So. 2d 1150, 1150-52 (Miss. 1989) (MISS. CODE ANN. § 47-7-3 was "permissive" parole statute and did not create constitutionally protected liberty interest in form of expectation of parole); State v. Burnham, 546 So. 2d 690, 691-93 (Miss. 1989) (MISS. CODE ANN. § 27-3-79(2) (Supp. 1989), which makes it a felony to willfully attempt "to evade or defeat any tax imposed by the State Tax Commission" sufficiently informed defendant that his actions were unlawful, even though Commission lacks authority to impose taxes); Butler v. State, 544 So. 2d 816, 820-23 (Miss. 1989) (where victim restitution is warranted, payment of child support to child of victim is type of special damages that is encompassed by statute and is enforceable against perpetrator); State v. Read, 544 So. 2d 810, 811-12 (Miss. 1989) (under MISS. CODE ANN. § 99-39-7 (Supp. 1989), trial court has no jurisdiction to entertain post-conviction motion for collateral relief unless Mississippi Supreme Court has first been presented motion for collateral relief and has granted filing of such motion in lower court); Kolb v. State, 542 So. 2d 265, 269 (Miss. 1989) (fellatio is sexual penetration for purposes of Mississippi sexual battery statute); Magee v. State, 542 So. 2d 228, 236 (Miss. 1989) (concurrent sentences are equivalent to "separate terms served," and robbery is "crime of violence" for purpose of habitual offender statute, MISS. CODE ANN. § 99-19-83 (Supp. 1989)); Ashley v. State, 538 So. 2d 1181, 1185 (Miss. 1989) (under MISS. CODE ANN. §§ 97-1-7, -3-73 (1972), attempted robbery is a crime of violence; word "crime" in burglary statutes encompasses both crimes and misdemeanors); McDonald v. State, 538 So. 2d 778, 780 (Miss. 1989) (under MISS. CODE ANN. § 97-3-7(2)(b) (1972), state may establish aggravated assault by showing defendant used deadly weapon in attempting to cause bodily injury).

[336] 550 So. 2d 410 (Miss. 1989).

[337] *Pennock*, 550 So. 2d at 411-12. Section 97-11-25 of the Mississippi Code states, in pertinent part, that:

> If any . . . person holding any public office or employment, shall unlawfully convert to his own use any money or other valuable thing which comes to his hands or possession *by virtue of his office of employment*, or shall not, when lawfully required to turn over such money or deliver such thing, immediately do so according to his legal obligation, he shall, on conviction, be committed to the department of corrections for not more than twenty (20) years, or be fined not more than five thousand dollars ($5,000).

MISS. CODE ANN. § 97-11-25 (Supp. 1989) (emphasis added).

[338] *Pennock*, 550 So. 2d at 411. The defendant, Judy Pennock, was a secretary with the Division of Vocational Rehabilitation, a state agency. *Id.*

simply stolen the money, not embezzled it.[339] The Mississippi Supreme Court agreed[340] and reversed the conviction, holding that, under the statute, embezzlement is the wrongful conversion of property *lawfully* possessed by the person charged, and because Pennock did not obtain the funds lawfully, "by virtue of [her] office" (as construed by the court), she could not be convicted of embezzlement.[341] The *Pennock* majority reasoned that, while in general the defendant was authorized to sign for the counselor and to handle checks received from the auditor's office payable to clients, this authority was limited to the *legal* submission of statements of account, and to *legal* receipt of client checks from the auditor.[342]

In *Butler v. State*,[343] the Mississippi Supreme Court had occasion to construe certain provisions of the Restitution to Victims of Crimes Act.[344] Specifically, the *Butler* court addressed the issues of (1) whether child support to the victim's child is within the statutory definition of pecuniary damages allowed under section 99-37-1 of the Mississippi Code[345] and (2) whether the child in *Butler* was a legally eligi-

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[339] *Id.* at 411-12.

[340] *Id.* at 412-14. Actually, the Mississippi Supreme Court was split on the issue with five justices supporting Justice Robertson and three justices supporting the dissenting opinion of Justice Dan Lee. *Id.* at 414. In his dissent, Justice Dan Lee argued that Pennock did have a legal right to sign her superior's name and that this legal right conferred lawful possession of the monies in her hands. *Id.* at 415-16 (Lee, Dan M., J., dissenting).

[341] *Id.* at 413-14.

[342] *Id.* at 414. The *Pennock* majority stated further that since Pennock had no authority to sign bogus statements of account for clients who were either fictitious or ineligible, she did not have lawful possession of the monies, and that Pennock's actions were "clearly performed by her under color of office, not by virtue of the office." *Id.*

[343] 544 So. 2d 816 (Miss. 1989).

[344] *Butler*, 544 So. 2d at 820-23. The defendant, William Curtis Butler, was tried by jury and found guilty of manslaughter. *Id.* at 820. Butler was sentenced to 20 years imprisonment; however, his sentence was suspended, and he was placed on probation for five years pursuant to certain conditions, including victim restitution. *Id.* The Restitution to Victims of Crimes Act is found at MISS. CODE ANN. § 99-37-1 to -25 (Supp. 1989).

[345] *Butler*, 544 So. 2d at 822. The court noted that for purposes of the victim restitution statutes, the term "victim" includes "any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities." *Id.* at 821 (quoting MISS. CODE ANN. § 99-37-1(d) (Supp. 1989)). In relevant part, § 99-37-1 defines "pecuniary damages" as:

> [A]ll special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and shall include, but not be limited to, the money equivalent of property taken, destroyed, broken or otherwise harmed, and losses such as medical expenses.

MISS. CODE ANN. § 99-37-1(b) (Supp. 1989). In addition, § 99-37-1 provides that restitu-

ble recipient.[346] The *Butler* court held that, with respect to the first issue, the child support payments ordered by the trial court as a condition of probation and as restitution to an alleged victim (the child of the decedent's girl friend) were indeed a type of special damages encompassed within the definition of "pecuniary damages" allowable under the restitution statute.[347] With regard to the second issue, however, the court found that since the child to whom payment was ordered was conceived while the mother was still married to a man other than the victim of the crime, the child was presumed to be the child of the husband under traditional principles of family law and thus could not be a legally eligible recipient.[348] The court then voided the imposition of monthly child support.[349]

In *State v. Burnham*,[350] the defendant, who had failed to pay state retail sales taxes, successfully argued at the trial court level that he could not be indicted under section 27-3-79(2) of the Mississippi Code because the indictment did not literally charge a crime.[351] Section 27-3-79(2) states that any person who willfully attempts "to evade or defeat any tax *imposed* by the State Tax Commission" shall be guilty of a felony.[352] The trial court found the statute unenforceable because the State Tax Commission lacks the power to impose a tax, and because "impose" and "collect" are not synonymous;[353] however, the Mississippi Supreme Court reversed.[354] The *Burnham* court conceded that

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tion includes "full, partial or nominal payment of pecuniary damages to a victim." MISS. CODE ANN. § 99-37-1(c) (Supp. 1989).

[346] *Butler*, 544 So. 2d at 822.

[347] *Id.* at 823. The court reasoned that when (b) and (c) of § 99-37-1 are viewed together, they necessarily provide for:

> [R]epayment of financial loss to victims who have been wrongfully deprived of a reasonable expectation of pecuniary benefit from the continued life of the deceased had he lived. The financial loss has to be quantifiable, and it would not include damages for loss of love and affection, mental anguish, or loss of companionship and society.

Butler, 544 So. 2d at 823.

[348] *Butler*, 544 So. 2d at 823. The court added that without further evidence of the child's paternity, the legitimacy of the child must be presumed. *Id.* (citing, *inter alia*, Deer v. State Dep't of Pub. Welfare, 518 So. 2d 649, 652 (Miss. 1988); Brabham v. Brabham, 483 So. 2d 341, 343 (Miss. 1986)).

[349] *Id.*

[350] 546 So. 2d 690 (Miss. 1989).

[351] *Burnham*, 546 So. 2d at 691.

[352] *Id.* (quoting MISS. CODE ANN. § 27-3-29(2) (Supp. 1989)). The defendant was Billie J. Burnham. *Id.*

[353] *Id.*

[354] *Id.* at 693.

the State Tax Commission had no authority to impose a tax and that "impose" did not mean "collect," but pointed out that the test was whether the statute failed reasonably to inform the defendant as to what conduct would subject him to prosecution.[355] The court concluded that, while "statutes imposing criminal penalties must be construed strictly in favor of the accused," a reasonable person reading section 27-3-79(2) in conjunction with the other sales tax statutes would know that willful attempts to evade the payment of sales taxes are illegal and would subject him to prosecution.[356]

Although not selected for textual discussion, two cases came before the court dealing with the Uniform Post-Conviction Collateral Relief Act;[357] one case came before the court dealing with the expectation of parole under section 47-7-3 of the Mississippi Code;[358] and one case came before the court dealing with the interpretation of who is an "authorized person" within the meaning of section 97-9-42(2), which deals with a failure to return from an authorized departure, as opposed to escape from jail itself.[359]

VII. Degree of Proof

The Mississippi Supreme Court rendered several opinions wherein the necessary degree of proof was at issue.[360] In *McClendon v. State*,[361]

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[355] *Id.* at 692 (citing ABC Interstate Theatres, Inc. v. State, 325 So. 2d 123, 125-26 (Miss. 1976)). The court added that it would ask only whether "a person of ordinary intelligence would by reading the statute receive fair notice of that which is required or forbidden." *Id.* (citing Roberson v. State, 501 So. 2d 398, 400 (Miss. 1981); Cassibry v. State, 404 So. 2d 1360, 1368 (Miss. 1981)).

[356] *Id.* at 692-93.

[357] *See* Fleming v. State, 553 So. 2d 505, 506 (Miss. 1989) (Mississippi Supreme Court held that it lacked jurisdiction over appeal because (1) Fleming pled guilty and, under Miss. Code Ann. § 99-35-101 (1972), was consequently prevented from raising his claim within context of direct appeal; and (2) Fleming did not file his request for free transcripts and other documents as part of motion under Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-5 (Supp. 1989)); State v. Read, 544 So. 2d 810, 811-12 (Miss. 1989) (lack of jurisdiction found for initial failure to present motion to Mississippi Supreme Court).

[358] *See* Harden v. State, 547 So. 2d 1150, 1150-52 (Miss. 1989) (permissive parole statute did not create constitutionally protected liberty interest in form of expectation of parole).

[359] *See* Brown v. State, 552 So. 2d 109, 110-12 (Miss. 1989) (deputy sheriff was "authorized" to trust prisoner to leave within meaning of Miss. Code Ann. § 97-9-49(2) (Supp. 1989) so as to make that statute proper one for additional sentencing).

[360] *See* Steele v. State, 544 So. 2d 802, 805-07 (Miss. 1989) (where circumstantial evidence is legally insufficient to establish anything more than probability of criminal agency such that no reasonable juror could have found defendant guilty beyond reasona-

the appellant was convicted of sexual battery, but subsequently filed a motion for post-conviction relief, based upon a claim of newly discovered evidence supporting his innocence.[362] The circuit court denied relief, stating that the degree of proof required to support this motion was a clear and convincing evidence standard, which the defendant had not met.[363] The *McClendon* court vacated and remanded, holding that, because the defendant was held to a clear and convincing evidence standard, when his claim should have been considered under a preponderance of the evidence standard, the order denying post-conviction relief was in error.[364] The court relied on section 99-39-23(7) of the Uniform Post-Conviction Collateral Relief Act, which provides that "no relief shall be granted under this chapter unless the prisoner proves *by a preponderance of the evidence* that he is entitled to such."[365]

VIII. Discovery

In *Porter v. State*,[366] the Mississippi Supreme Court directed the Supreme Court Advisory Committee on Rules in the State of Mississippi to consider certain changes in Rule 4.06 of the Uniform Criminal

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ble doubt, defendant's motion for judgment of acquittal notwithstanding the verdict must be sustained); Gamble v. State, 543 So. 2d 184, 185 (Miss. 1989) (where defendant has made out affirmative defense of entrapment with uncontradicted, undisputed, and unimpeached evidence, and prosecution has failed to rebut evidence in any way, defendant is entitled to have his motion for directed verdict sustained); McClendon v. State, 539 So. 2d 1375, 1376-77 (Miss. 1989) (degree of proof required in support of motion for post-conviction relief is preponderance of evidence standard); *see also* Wright v. State, 540 So. 2d 1, 4 (Miss. 1989) (by presenting evidence in their own behalf, defendants waived any error in trial court's refusal to grant them directed verdict at close of state's case-in-chief; defendant's failure to renew motion for directed verdict at close of all evidence constituted waiver of objection to sufficiency of evidence).

[361] 539 So. 2d 1375 (Miss. 1989).

[362] *McClendon*, 539 So. 2d at 1375-76. Specifically, the defendant, Sylvester McClendon, asserted that another man, Larry Luckett, had confessed to the crime for which McClendon had been convicted. *Id.* at 1376. At the evidentiary hearing entertaining his motion, Luckett's testimony conflicted with his earlier affidavit and confession, in that he denied he had attempted the sexual battery. *Id.*

[363] *Id.* at 1376.

[364] *Id.* at 1377.

[365] *Id.* at 1376 (quoting Miss. Code Ann. § 99-39-23(7) (Supp. 1989) (emphasis added)). The *McClendon* court found "beyond dispute" the acute difference inherent in the application of a preponderance standard vis-a-vis a clear and convincing evidence standard. *Id.*

[366] 551 So. 2d 104 (Miss. 1989).

Rules of Circuit Court Practice.[367] The defendant was found guilty of manslaughter on the basis of testimony by witnesses that the defendant intentionally shot the victim without provocation.[368] The defendant argued on appeal that the trial court should have allowed him to inspect and copy all witnesses' statements in the State's possession.[369] The *Porter* court, however, held that, while *in camera* inspection did reveal possibly exculpatory statements, the trial court's denial of their use was harmless error because of the overwhelming evidence of the defendant's guilt.[370] The *Porter* court then addressed changes it felt should be made in Rule 4.06, under the auspices of its prior decision in *Barnes v. State*.[371] The *Porter* court reaffirmed its statements in *Barnes* to the effect that Rule 4.06 should not provide for *in camera* inspection of prior statements by witnesses, as the current rule states, but should instead provide for disclosure of these types of statements directly to the defendant.[372] The court felt that the reasons for change enumerated in *Barnes*, including the prevention of time consuming in-

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[367] *Porter*, 551 So. 2d at 105.

[368] *Id.* at 104.

[369] *Id.*

[370] *Id.* at 105.

[371] *Id.* The pertinent language of Rule 4.06 stated:

> (h) Upon request of the defendant, the prosecution shall furnish to the court in camera any prior written statements of witnesses. If these materials are found to be materially inconsistent with the witness's testimony, the statements shall be supplied to defense counsel prior to cross-examination.

MISS. UNIF. CRIM. R. CIR. CT. P. 4.06. However, in Barnes v. State, 471 So. 2d 1218 (Miss. 1985), the court directed that current Rule 4.06 should be deleted, and that subsection (a)(1) should be amended as follows:

> The prosecution shall disclose to each defendant or to his attorney, and permit him to inspect, copy, test and photograph upon request and without further order the following:
>
> (1) Names and addresses of all witnesses in chief proposed to be offered by the prosecution at trial, *together with a copy of the contents of any statement, written or unwritten, recorded or otherwise preserved, of each such witness* . . . . [proposed new language in italics].

Barnes, 471 So. 2d at 1222. The *Barnes* court further stated:

> This rule would be subject to the further provisions of Rule 4.06 restricting discovery specifically including the proviso found in the present rule that the court:
>
> > May deny disclosure authorized by this section if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel.

Id. (quoting Rule 4.06).

[372] *Porter*, 551 So. 2d at 105.

terruption of trial court proceedings to make *in camera* inspections, were still valid.[373] Accordingly, the court referred the matter to the Supreme Court Advisory Committee on Rules to consider these recommendations.[374]

Two other cases involving discovery issues came before the court in 1989 but were not selected for textual treatment.[375]

IX. Insanity

In *White v. State*,[376] the court dealt briefly with the defense of insanity. In holding that the verdict of the jury was not against the overwhelming weight of the evidence,[377] the court noted that the issue of insanity was for the jury to determine, and that the jury was not bound by any one expert's testimony but could accept it in whole or in part.[378] Since the state did present expert testimony to the effect that the accused was not insane at the time of the crime, although he did suffer from a personality disorder and severe depression,[379] the court held that there was ample evidence from which a jury could have de-

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[373] *Id.*

[374] *Id.*

[375] *See* Strickland v. State, No. 58,493, slip op. at 5, 6 (Miss. Dec. 20, 1989) (defendant's failure to request continuance where prosecution did not make discovery available within time provided by statute constituted waiver of objection thereto); Kelly v. State, 553 So. 2d 517, 518-19 (Miss. 1989) (failure of defendant to request continuance based upon non-compliance by state with discovery requests constitutes waiver of this discovery violation); Steele v. State, 544 So. 2d 802, 807-08 (Miss. 1989) (prior statements of state witnesses must be disclosed to defense counsel); Cousan v. State, 543 So. 2d 177, 178-79 (Miss. 1989) (when prosecution has in its possession alleged recorded conversation between criminal defendant and undercover officer, tape recording is discoverable, and decision as to whether or not it is exculpatory is properly left for defense to decide); *see also* Hall v. State, 546 So. 2d 673, 676-77 (Miss. 1989) (defense evidence improperly excluded where defense's failure to comply with discovery requirements was not willful and deliberate); Darby v. State, 538 So. 2d 1168, 1175-76 (Miss. 1989) (where defense counsel intentionally and willfully violates Miss. Unif. Crim. R. Cir. Ct. P. 4.06 by failing to provide state with complete list of defense witnesses, trial court may exclude testimony of defense witness upon state's objection).

[376] 542 So. 2d 250 (Miss. 1989). Roosevelt White was convicted of the murder of his employer, Ida Lee Schwartz, after shooting her three times in the face and neck and immediately surrendering to police. *White*, 542 So. 2d at 251. White's defense was that he was *M'Naghten* insane at the time of the shooting. *Id.* At his trial, two doctors who evaluated White for the State testified that, while he suffered from a personality disorder and severe depression, White was not insane at the time of the crime. *Id.* Two doctors for the defense testified that White was insane at the time of the slaying. *Id.*

[377] *Id.* at 252.

[378] *Id.* (citing, *inter alia*, Brady v. State, 425 So. 2d 1347, 1350 (Miss. 1983)).

[379] *Id.* at 251.

termined that the accused was not insane under the *M'Naghten* standard, but instead understood the consequences of his actions.[380] The court stated once again that, in Mississippi, the test for insanity is "whether the defendant was unable to distinguish right from wrong at the time the act was committed."[381]

The Mississippi Supreme Court addressed the issue of a defendant's competency in *Shook v. State*.[382] The defendant argued that, because he was deaf, he was also physically and possibly mentally incompetent to stand trial.[383] The Mississippi Supreme Court rejected this argument, stating that "the rules which apply to persons who are deaf, illiterate, and mentally retarded do not apply to the deaf who are able to complete high school and, do, with moderate success, academic work at the college level."[384]

X. VERDICTS

Two cases were decided in 1989 involving issues concerning the verdict at the trial level, although only one will be discussed textually.[385] In *State v. Taylor*,[386] the defendant was tried for grand larceny.[387] At the end of its deliberations, the jury signified that it had reached a verdict, which the court received and determined to be in the correct form.[388] The court then announced the jury's verdict of not guilty and ordered the verdict filed.[389] Thereafter, the State requested a poll of the jury, and the court ascertained that one juror did not

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[380] *Id.* at 252.

[381] *Id.* (citing, *inter alia*, Porter v. State, 492 So. 2d 970 (Miss. 1986); Frost v. State, 453 So. 2d 695, 697 (Miss. 1984)); *see also* Davis v. State, 551 So. 2d 165, 173-74 (Miss. 1989) (*M'Naghten* rule approved and applied).

[382] 552 So. 2d 841 (Miss. 1989). The defendant, Phillip Shook, Jr., was deaf but was also a high school graduate and college student. *Shook*, 552 So. 2d at 842.

[383] *Id.*

[384] *Id.* The *Shook* court focused specifically on the findings of the trial judge that the defendant was afforded all his constitutional rights. *Id.*

[385] *See* Stringer v. State, 548 So. 2d 125, 128-29 (Miss. 1989) (verdict that defendant shot and killed victim while he was engaged in attempt to rob victim's husband was not against overwhelming weight of evidence; eyewitness testimony and forensic evidence supported finding); State v. Taylor, 544 So. 2d 1387, 1388-89 (Miss. 1989) (where verdict was rendered in proper form in open court, accepted, and ordered filed, trial court could not thereafter poll the jury and return it for further deliberations).

[386] 544 So. 2d 1387 (Miss. 1989).

[387] *Taylor*, 544 So. 2d at 1388. The defendant was Carl Taylor. *Id.*

[388] *Id.*

[389] *Id.*

agree with the verdict.[390] The court then ordered the jury to retire for further deliberations; thirty minutes later, the jury returned a verdict of guilty, which the court accepted.[391] Citing *State v. Chambliss*,[392] the *Taylor* court held that where a verdict is rendered in proper form in open court, accepted, and ordered filed, the trial court may poll the jury but cannot require the jury to reconsider its verdict.[393] The Mississippi Supreme Court stated further that, under Rules 5.15[394] and 5.14[395] of the Mississippi Uniform Criminal Rules of Circuit Court Practice, the trial court may declare a mistrial if a poll of the jury reveals that there was not a unanimous verdict, but the motion to poll must be made *before* the verdict has been recorded.[396] In the instant case, because the verdict was examined for form and responsiveness, was read in open court, and was ordered filed before the poll of the jury was taken, thus violating *Chambliss* and Rule 5.14, the court ordered the defendant discharged.[397] To avoid the result in this case, the court then enumerated a seven-step procedure which a circuit court might employ in receiving a verdict, including an inquiry into whether the verdict is unanimous and a poll of the jury before the court orders the filing of the verdict.[398] If the verdict is not unanimous, then the

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[390] *Id.*

[391] *Id.*

[392] 142 Miss. 256, 107 So. 200 (1926).

[393] *Taylor*, 544 So. 2d at 1388-89.

[394] *Id.* Rule 5.15 provides in pertinent part: "Upon motion of a party or its own motion, the Court may declare a mistrial if: . . . (3) Upon a poll of the jury there is not unanimous concurrence with the verdict returned." MISS. UNIF. CRIM. R. CIR. CT. P. 5.15.

[395] *Taylor*, 544 So. 2d at 1388-89. Rule 5.14 cautions, however, "that no motion to poll the jury shall be entertained after the jury is discharged *or the verdict recorded.*" MISS. UNIF. CRIM. R. CIR. CT. P. 5.14 (emphasis added).

[396] *Taylor*, 544 So. 2d at 1389.

[397] *Id.*

[398] *Id.* Specifically, Justice Robertson stated that:

> [T]he better practice a circuit court might employ in receiving a verdict may consist of the following:
>
> (1) After a signal from the jury, the court may order the jurors assembled in open court and inquire of them if a verdict has been reached;
>
> (2) Upon an affirmation of its question, the court should inquire if the verdict is, in fact, the verdict of each member of the jury;
>
> (3) Upon an affirmation of the jury, the verdict should be handed to the court for the judge to ascertain whether or not it is in proper form and responsive to the issues;
>
> (4) The verdict should then be read in open court;
>
> (5) The prosecution and defendant may be asked if either desires a poll of the jury;
>
> (6) The poll, if requested, may be taken, and

court may return the jury for further deliberations or declare a mistrial.[399]

XI. Prosecutorial Misconduct

The Mississippi Supreme Court heard several cases in 1989 dealing with prosecutorial misconduct. All of these cases involved areas of well-settled law. The case of *Griffin v. State* dealt with a prosecutor's wrongful reference to a defendant's failure to testify.[400] *Dunaway v. State* dealt with the extreme extent to which a prosecutor's remarks may go before prejudicing a defendant so as to result in a decision influenced by prejudice.[401] Finally, in the case of *Williams v. State*, the Mississippi Supreme Court reversed and remanded where a prosecutor, in blatant disregard of the trial court's ruling of admissibility, continued to refer to inadmissible evidence throughout trial.[402]

XII. Miscellaneous

These decisions addressed the propriety of multiple count indict-

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(7) Only thereafter, the court should order the verdict filed by the clerk. *Id.*

[399] *Id.*

[400] Griffin v. State, 557 So. 2d 542, 553 (Miss. 1989). In *Griffin* the Mississippi Supreme Court reversed and remanded where a prosecutor in closing argument made reference, although indirect, to the fact that the defendant did not take the stand. *Id.* at 553.

[401] Dunaway v. State, 551 So. 2d 162 (Miss. 1989). In *Dunaway*, the court sternly reprimanded the prosecutor for numerous exceedingly inflammatory comments made during closing argument but found that, however improper, the statements failed to create unjust prejudice against the accused which would have resulted in a decision influenced by prejudice. *Id.* at 163-64; *see also* Gray v. State, 549 So. 2d 1316, 1323-24 (Miss. 1989) (where defendant was charged with making harassing phone calls, there is no error in prosecutor's referring to defendant as "coward" since term is accurate description; additionally, even if such prosecutorial conduct is improper, there is no reversible error where trial court sustains defense objection and instructs jury to disregard comments); White v. State, 542 So. 2d 250, 254-56 (Miss. 1989) (prosecutor's references to defendant's possible stay at mental hospital were allowed as invited by defense counsel); Harris v. State, 537 So. 2d 1325, 1329-31 (Miss. 1989) (prosecutor's remarks vilifying defendant deemed harmless error in face of great incriminating evidence against defendant).

[402] Williams v. State, 539 So. 2d 1049 (Miss. 1989). The court reversed in *Williams* because of the prosecution's continued reference to a video tape in blatant disregard of the trial court's ruling of inadmissibility. The court agreed with Williams that such action on the part of the prosecution denied him a fair trial by leading the jury to perceive that the defense had managed to keep incriminating evidence from them. *Id.* at 1051. The court further noted that it was reversible error for the prosecutor to signal a witness while on the stand. *Id.* at 1052.

ments,[403] the wrongful quashing of necessary witnesses' subpoenas,[404] the severance of trials between co-defendants,[405] the refusal of a motion for a continuance where a defendant was not prepared for trial because of his own dilatory behavior,[406] motions to amend indictments,[407] and changes of venue.[408] None of these decisions present any real deviations from well established rules of law. However, three cases decided this year concerning multiple count indictments did help to establish more firmly the court's position thereon.

Historically, the Mississippi Supreme Court has not allowed multiple count indictments.[409] The court avoided them so as to prevent compounded punishment growing out of a single set of operative facts.[410] However, this prohibition on multiple count indictments was altered to a certain degree when the legislature passed, and the supreme court recognized,[411] section 99-7-2 of the Mississippi Code which provides that two or more offenses which are triable in the same court, based on the same act or transaction, or are based on two or more acts or transactions which constitute part of a common scheme or plan, may be

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[403] *See* McCarty v. State, 554 So. 2d 909 (Miss. 1989); Gray v. State, 549 So. 2d 1316 (Miss. 1989); Blanks v. State, 542 So. 2d 222 (Miss. 1989). For further discussion, see *infra* notes 409-25 and accompanying text.

[404] Hentz v. State, 542 So. 2d 914, 915-17 (Miss. 1989) (quashing of subpoena after showing of materiality of absent witnesses' testimony was wrongful).

[405] Hawkins v. State, 538 So. 2d 1204, 1207 (Miss. 1989) (severance of trials required where one defendant is prejudiced by testimony of co-defendant).

[406] Jackson v. State, 538 So. 2d 1186, 1190-91 (Miss. 1989) (where defendant fails to contact his attorney to advise him of his whereabouts in order to prepare for trial, denial of motion for continuance not abuse of discretion, nor is it ineffective assistance of counsel; absent showing of substantial prejudice to movant's right to fair opportunity to prepare and present his defense, defendant has obligation to communicate with attorney).

[407] Nathan v. State, 552 So. 2d 99, 105-07 (Miss. 1989) (amendment allowed where it does not materially alter indictment); Griffin v. State, 540 So. 2d 17, 20-21 (Miss. 1989) (amendment prohibited where it materially altered indictment).

[408] Harris v. State, 537 So. 2d 1325, 1327-29 (Miss. 1989) (where no abuse of trial court's discretion is found, failure to grant motion for change of venue is not reversible error).

[409] McCarty v. State, 554 So. 2d 909, 914 (1989) (citing Burney v. State, 515 So. 2d 1154, 1156 (Miss. 1987); Brock v. State, 483 So. 2d 358, 362 (Miss. 1986); Friday v. State, 462 So. 2d 336, 338 (Miss. 1985); Stinson v. State, 443 So. 2d 869, 870 (Miss. 1983)); *see* Thomas v. State, 474 So. 2d 604, 605 (Miss. 1986); Johnson v. State, 452 So. 2d 850 (Miss. 1984); Bennett v. State, 451 So. 2d 727, 728 (Miss. 1984).

[410] Woodward v. State, 533 So. 2d 418, 422 (Miss. 1988).

[411] *Id.*; *see also McCarty*, 554 So. 2d at 914 (although MISS. CODE ANN. § 99-7-2 (1972) addressed matters of criminal practice and procedure—an area recently deemed solely in province of Mississippi Supreme Court in Hall v. State, 539 So. 2d 1338, 1344-46 (Miss. 1989)—court saw fit to accept and enforce it).

charged in the same indictment.[412] Since the effective date of the statute, July 1, 1986, the Mississippi Supreme Court has consistently required that in order for the counts to be joined, they must arise from some common transaction or occurrence.[413] For instance, in *McCarty v. State*, joinder of two counts of burglary, one of which allegedly occurred on June 17, 1989, the other on June 19, 1987, was found to be reversible error.[414] The court emphasized that the alleged instances occurred at least two days apart and that no evidence of a common scheme or plan was presented.[415] The court again reversed in the case of *Gray v. State*, where the defendant was charged with making phone calls with intent to annoy, abuse, threaten or harass.[416] The indictment included one count of making one phone call to one victim and another count of a series of phone calls to that victim's neighbor.[417] The court found that the phone calls referred to in counts one and two were made on separate and distinct occasions (two weeks apart) and involved different victims and different subject matter.[418] Therefore, the

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[412] MISS. CODE ANN. § 99-7-2 (Supp. 1989) states:

(1) Two (2) or more offenses which are triable in the same court may be charged in the same indictment with a separate count for each offense if: (a) the offenses are based on the same act or transaction; or (b) the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.

(2) Where two (2) or more offenses are properly charged in separate counts of a single indictment, all such charges may be tried in a single proceeding.

(3) When a defendant is convicted of two (2) or more offenses charged in separate counts of an indictment, the court shall impose separate sentences for each such conviction.

(4) The jury or the court, in cases in which the jury is waived, shall return a separate verdict for each count of an indictment drawn under subsection (1) of this section.

(5) Nothing contained in this section shall be construed to prohibit the court from exercising its statutory authority to suspend either the imposition or execution of any sentence or sentences imposed hereunder, nor to prohibit the court from exercising its discretion to impose such sentences to run either concurrently with or consecutively to each other or any other sentence or sentences previously imposed upon the defendant.

Id.

[413] *McCarty*, 554 So. 2d at 914-15; Gray v. State, 549 So. 2d 1316, 1321 (Miss. 1989); Blanks v. State, 542 So. 2d 222, 225 (Miss. 1989); Brown v. State, 534 So. 2d 1019, 1021-23 (Miss. 1988); Estes v. State, 533 So. 2d 437, 439 (Miss. 1988); *Woodward*, 533 So. 2d at 421-22, 436-37.

[414] *McCarty*, 554 So. 2d at 914.

[415] *Id.* at 915-16.

[416] *Gray*, 549 So. 2d at 1318.

[417] *Id.*

[418] *Id.* at 1321.

counts could not properly be joined in a single indictment.[419] In the case of *Blanks v. State*, however, the Mississippi Supreme Court found sufficient connection between murder and aggravated assault charges arising within the same time frame and out of the same incident to permit their joinder.[420]

During 1989, the court has simply reinforced its earlier interpretations of section 99-7-2 of the Mississippi Code. The court has frequently revealed its rationale in numerous cases, stating that:

> There is a great potential for mischief in allowing a multi-count indictment where the charges arise out of separate transactions or occurrences in that the jury may believe that the defendant is charged with so much that he must be guilty of something.[421]

These interpretations are set out in the 1988 cases of *Brown v. State*,[422] *Estes v. State*,[423] and *Woodward v. State*.[424] The requirement that the joined counts be based on the same act or transaction or constitute a common scheme or plan has remained fast.[425]

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David A. Burns
Deana Patterson Earnest
Marcie Fyke

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[419] *Id.* at 1321-23.

[420] *Blanks*, 542 So. 2d at 225.

[421] Brown v. State, 534 So. 2d 1019, 1022 (Miss. 1988) (citing Thomas v. State, 474 So. 2d 604, 607 (Miss. 1985)).

[422] *Brown*, 534 So. 2d at 1019.

[423] 533 So. 2d 437 (Miss. 1988).

[424] 533 So. 2d 421 (Miss. 1988).

[425] *Brown*, 534 So. 2d at 1023.

MISCELLANEOUS

I. Family Law

During this 1989 survey period, the Mississippi Supreme Court rendered a plethora of family law decisions, which, for purposes of this discussion, have been divided into five main topic areas: child support,[1] shared parental responsibility,[2] divorce,[3] alimony,[4] and paternity.[5]

A. Child Support

The parental responsibility to provide for the maintenance and support of the child is one of the most strongly-upheld moral obligations known to the law.[6] Although neither of the two Mississippi statutes mandating child support in divorce actions specifically discusses the duration of this financial obligation,[7] the Mississippi Supreme Court in *Nichols v. Tedder*[8] held that courts nonetheless lacked the statutory authority to order any form of support for the benefit of the post-emancipated child.[9] Under common law, this parental responsibil-

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[1] *See infra* notes 6-33 and accompanying text.

[2] *See infra* notes 34-62 and accompanying text.

[3] *See infra* notes 63-69 and accompanying text.

[4] *See infra* notes 70-82 and accompanying text.

[5] *See infra* notes 83-92 and accompanying text.

[6] J. Bunkley & W. Morse, Bunkley and Morses Amis on Divorce and Separation in Mississippi § 9.00, at 231, § 14.04, at 272 (1957); S. Hand, Mississippi Divorce, Alimony and Child Custody § 11-14, at 198 (1981); 59 Am. Jur. 2d *Parent and Child* § 50 (1971).

[7] *See* Miss. Code Ann. § 93-5-2 (Supp. 1989) (irreconcilable differences divorce statute referring to "any children of that marriage"); Miss. Code Ann. § 93-5-23 (Supp. 1989) (authorizing courts to "make all orders touching the care, custody and maintenance of the children of the marriage"). *But see* Miss. Code Ann. § 93-11-65 (Supp. 1989) (conferring upon court authority to hear independent actions relating to "custody, care, support and maintenance of minor children").

[8] 547 So. 2d 766 (Miss. 1989).

[9] *Nichols*, 547 So. 2d at 770; *see* Watkins v. Watkins, 337 So. 2d 723, 724 (Miss. 1976) (noncustodial parent not required to support adult retarded son); Wright v. Coleman, 137 Miss. 699, 705, 102 So. 774, 776 (1925) (adult child cannot sue parent for support).

Addressing a second issue, the court aligned itself with a majority of other jurisdictions and determined that state courts retained the authority to allocate a federal tax dependency exemption under I.R.C. § 152(e) (1988) but only by ordering the execution of a waiver in favor of the noncustodial parent. *Nichols*, 547 So. 2d at 780. As a policy matter, the court reasoned that allocating the exemption to the noncustodial parent re-

ity terminated upon the child's reaching the age of majority,[10] but Mississippi courts had in past decisions implicated that the obligation might be extended under certain circumstances, when, for example, the child was pursuing a college education.[11]

In *Nichols*, the Mississippi Supreme Court affirmed a trial court's decision to terminate the noncustodial parent's duty to support his twenty-one-year-old child in her last semester of college.[12] In doing so, the court drew a strict line of demarcation between regular child support which included payments for living expenses of the minor child[13] and other support which included college educational expenses for the adult-aged child.[14] In the former instance, courts were authorized by

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duced the total amount of income tax paid, a savings which exceeded the increased tax liability of the custodial parent. *Id.* at 775. Such a tax saving was perceived by the court as inuring to the benefit of the child. *Id.*

[10] 59 AM. JUR. 2d, *supra* note 6, at § 55; Annotation, *Parent's Obligation to Support Adult Child*, 1 A.L.R. 2d 910, 912-13 (1948).

[11] *See* Boleware v. Boleware, 450 So. 2d 92, 94 (Miss. 1984) (parties' agreed modification of divorce decree requiring noncustodial parent to pay college expenses obligated parent to provide such support past child's age of majority); Rankin v. Bobo, 410 So. 2d 1326, 1329 (Miss. 1982) (financially able parent must provide college expenses); Hambrick v. Prestwood, 382 So. 2d 474, 477 (Miss. 1980) (recognizing duty to provide for college education but refusing to enforce duty where child admitted hating noncustodial parent); Wray v. Langston, 380 So. 2d 1262, 1264 (Miss. 1980) (court increased support for 19-year-old child to help defray college expenses); Pass v. Pass, 238 Miss. 449, 458-59, 118 So. 2d 769, 773 (1960) (holding that statute authorizing court-ordered support was broad enough to encompass payment of expenses for college education), *cited with approval in* Duett v. Duett, 285 So.2d 140 (Miss. 1973). *See generally* Annotation, *Postsecondary Education As Within Nondivorced Parent's Child Support Obligation*, 42 A.L.R. 4th 819, 828, 830 (1985) (discussing jurisdictions holding noncustodial parent liable).

[12] *Nichols*, 547 So. 2d at 770. The original divorce decree did not require the noncustodial parent to contribute to the cost of the child's college education. *Id.* at 769. The custodial parent had argued that since the child was a full-time college student and since Mississippi had recognized the duty of the noncustodial parent to provide for a child's higher education, then the court should continue the support obligation past the child's date of adulthood. *Id.* at 768. The supreme court nonetheless preferred to leave the decision to the parent's own conscience and sense of duty to provide such support but maintained that post-emancipation care provided for by settlement agreement was enforceable even though it could not be court-ordered initially. *Id.* at 770.

[13] *Id.* at 769. Examples cited by the court as constituting regular child support included: reasonable and necessary dental expenses, Clark v. Myrick, 523 So. 2d 79, 81 (Miss. 1988); expenses for psychological treatment, Martin v. Martin, 538 So. 2d 765, 767 (Miss. 1989); and transportation expenses including the cost of an automobile, Diamond v. Diamond, 403 So. 2d 129, 131 (Miss. 1981).

[14] *Nichols*, 547 So. 2d at 769. The court did not specifically overrule past precedent regarding payment of college expenses but instead insisted that courts lacked the statutory authority to order the noncustodial parent to provide any support, regardless of its

statute to adjudicate an adequate support provision,[15] but in the latter lacked power to do so except when enforcing the parties' own contractual agreement.[16]

The plaintiff in the *Nichols* case successfully sought modification of a support order because the eldest child attained the age of majority, and this constituted a material change in circumstances.[17] In *Morris v. Morris*,[18] the supreme court rejected a similar appeal to reduce a noncustodial parent's support obligation because the alleged change, although substantial, did not arise after entry of the parties' divorce decree.[19] In *Morris*, the parent filed a motion to modify the parties' agreement less than four months after entry of the final divorce judgment[20] and asserted as grounds for the modification an adverse change

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form, to the adult-aged child. *Id.* at 770.

[15] *Id.* at 769. The Mississippi Supreme Court insisted that the legislative use of the term "children" in § 93-5-23 and § 93-11-65 described "minor children" and that past precedent defined 21 years as the age of majority. *Nichols*, 547 So. 2d at 768, 770 (citing Watkins v. Watkins, 337 So. 2d 723 (Miss. 1976)). Thus, Mississippi support statutes, by implication, pertained only to children under 21 years of age. *Id.* at 770.

[16] *Nichols*, 547 So. 2d at 770. Such an agreement could exist as a separate contract but the court seems to be referring, although not exclusively, to a no-fault divorce action where the parties admit their irreconcilable differences and incorporate into a divorce decree a mutually-acceptable written settlement agreement. *Id.* Such an agreement could, of course, provide for the continued support of a 21-year-old child. *Id.*; *see* MISS. CODE ANN. § 93-5-2 (Supp. 1989) (listing procedures for irreconcilable differences divorce).

[17] *Nichols*, 547 So. 2d at 768; *see* Campbell v. Campbell, 357 So. 2d 129, 130 (Miss. 1978) (court retained jurisdiction over child support payment orders); Crum v. Upchurch, 232 Miss. 74, 79, 98 So. 2d 117, 119 (1957) (basing modification order upon significant and material change of circumstances); MISS. CODE ANN. § 93-5-23 (Supp. 1989) (chancery court has continuing jurisdiction to modify support orders).

[18] 541 So. 2d 1040 (Miss. 1989).

[19] *Morris*, 541 So. 2d at 1044; *see* Trunzler v. Trunzler, 431 So. 2d 1115, 1116 (Miss. 1983) (change must be unanticipated at time of entry of original decree); Shaeffer v. Shaeffer, 370 So. 2d 240, 242 (Miss. 1979) (substantial change relative only to after-arising circumstances); *Campbell*, 357 So. 2d at 130 (original decree operated as res judicata until subsequent change occurred); Hooker v. Hooker, 205 So. 2d 276, 278 (Miss. 1966) (modification justified by material change of circumstances).

[20] *Morris*, 541 So. 2d at 1041-42. The court attempted but failed to find any prior Mississippi case which considered a modification of a settlement agreement in so short a period of time. *Id.* at 1043 (citing Banks v. Banks, 511 So. 2d 933, 934 (Miss. 1987) (seven years); East v. East, 493 So. 2d 927, 930 (Miss. 1986) (three years)). However, the court discussed with approval Roberts v. Roberts, 395 So. 2d 1035, 1036 (Ala. Civ. App. 1981), a case in which an Alabama court reviewed a petition to modify a six-month-old divorce judgment and concluded that because of the short time period involved, it could not modify the support provisions without close scrutiny. *Id.*

in financial status.[21] The supreme court characterized petitioner's bleak financial situation as being reasonably anticipated and concluded that permitting a modification so short a period of time after the date of the original agreement[22] would undermine the statutory settlement provisions.[23]

Also during the 1989 survey period, the Mississippi Supreme Court once again extolled the advantages of escalation clauses providing for automatic annual increases in child support in anticipation of, and to avoid the need for, additional costly and time-consuming court litigation.[24] Ironically, this pronouncement occurred in *Wing v. Wing*,[25] a case in which the court found an automatic adjustment clause fatally defective because it lacked specificity[26] and because it failed to mea-

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[21] *Morris*, 541 So. 2d at 1042. Mr. Morris had been employed at the same company for 13 years but was terminated from his position four months before the parties' divorce was finalized. *Id.* at 1041. He received severance pay for six months thereafter at $1740 per month and one month later was able to find employment at $972 per month, a significantly reduced rate of pay. *Id.* at 1041-42. Mr. Morris' child support obligation was $950 per month. *Id.* at 1041.

[22] *Id.* at 1043. The court agreed that the reduction in Mr. Morris' income qualified as a material and substantial change. *Id.*

[23] *Id.* Under MISS. CODE ANN. § 93-5-2 (Supp. 1989), parties citing irreconcilable differences as grounds for divorce must enter into an agreement sufficiently settling all property, child care, and custody matters. *Id.* In the instant case, the Morris' settlement agreement contained the following statement: "Husband and Wife agree that they are financially able to perform each and every obligation stated in this Agreement." *Morris*, 541 So. 2d at 1041. The supreme court determined that the inclusion of this specific provision indicated that Mr. Morris was well aware of his court-ordered financial obligation, regardless of the fact that his present income made compliance impossible. *Id.* at 1044.

[24] *See* MISS. CODE ANN. § 43-19-101 (Supp. 1989) (mandatory percentage guidelines for initial awards of child support without reference to escalation clauses).

[25] 549 So. 2d 944 (Miss. 1989).

[26] *Wing*, 549 So. 2d at 947. The lower court had found Russell Wing, the noncustodial parent, in contempt of court for failing to pay child support. *Id.* at 945. This delinquency accrued because of the operation of an escalation clause contained in a property settlement agreement incorporated into the parties' final divorce judgment. *Id.* at 945-56. Mr. Wing appealed from the contempt order pursuant to MISS. CODE ANN. § 11-51-12 (Supp. 1989) and argued that an ambiguity in the escalation provision made compliance impossible. *Wing*, 549 So. 2d at 945. The supreme court agreed that Mr. Wing should not be held in contempt if it was indeed impossible for him to abide by the judgment because the support provisions were either incomplete or indeterminable. *Id.* at 947-48; *see* Hall v. Wood, 443 So. 2d 834, 841-42 (Miss. 1983) (injunction must be clear); Aldridge v. Parr, 396 So. 2d 1027, 1030 (Miss. 1981) (part of divorce decree ordering husband to pay 50% of gross pay was too uncertain to be enforceable); Webb v. Webb, 391 So. 2d 981, 984 (Miss. 1981) (decree designating payment at "reasonable amount" was too indefinite); Morgan v. United States Fidelity & Guar. Co., 191 So. 2d

sure both the increased financial needs of the child and the ability of the noncustodial parent to provide increased support.[27] In *Wing*, the escalation clause at issue paced child support payments with the current rate of inflation "as set forth in the consumer price index."[28] A genuine dispute between the parties arose over the amount owed because the agreement failed to specify which index would be utilized and which year the increase would commence.[29] The court cautioned that to avoid such ambiguity in the future, attorneys must employ escalation clauses which: (1) specified the particular cost of living or consumer price index; (2) showed the applicable ratio; (3) calculated the base figure; (4) established frequency of adjustments; and (5) indicated an effective date for each adjustment.[30]

Also in 1989, the Mississippi Supreme Court extended the definition of the term "medical expenses" to include expenses for psychological treatment.[31] The court deemed such an extension normal when

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851, 854 (Miss. 1966) (extraneous references made decree indefinite and unenforceable); V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 625 (1925) (decree must be clear and unambiguous).

[27] *Wing*, 549 So. 2d at 947. The court rearticulated a four-factor test first announced in an earlier case which balanced the support equation so that an escalation clause would not overemphasize any one side. *Id.* These factors included: (1) the rate of inflation; (2) the noncustodial parent's increase or decrease in income; (3) the child's expenses; and (4) the custodial parent's separate income. *Id.* (citing Tedford v. Dempsey, 437 So. 2d 410, 419 (Miss. 1983)).

[28] *Id.* at 946. The property settlement read in pertinent part, as follows: "The Husband hereby agrees and obligates himself to pay to the Wife the sum of $400.00 per month for [child] support . . . beginning October 1, 1979 . . . .The Husband further agrees to increase said support each year according to the rate of inflation as set forth in the consumer price index." *Id.*

[29] *Id.* There was over a $6,000 difference in the amount of child support alleged by both parties to be in arrearage. *Id.* Numerous consumer indices were available. *Id.* The rate of inflation was determined by dividing the current year's consumer price index into the difference between the previous and the current year's indexes. *Id.* at 946 n.2.

[30] *Id.* at 948. The court noted that other states had addressed the problem in a variety of ways, *see* MINN. STAT. ANN. § 518.641 (West Supp. 1988) (indexing support orders to rate of inflation); Brackney, *Battling Inconsistency and Inadequacy: Child Support Guidelines in the States*, 11 HARV. WOMEN'S L.J. 197, 211-13 (1988) (suggesting use of some process for updating child support orders), and hinted that the Mississippi Legislature should consider undertaking similar endeavors. *Wing*, 549 So. 2d at 948.

[31] Martin v. Martin, 538 So. 2d 765, 767 (Miss. 1989). The parties' divorce decree ordered Mr. Martin, the noncustodial parent, to pay "all medical expenses incurred for and on behalf of [the] minor child . . . ." *Id.* at 765. Several years later, the child became addicted to drugs and alcohol and was institutionalized for treatment. *Id.* The total cost of the treatment program was over $15,000, $11,000 of which was paid by Mr. Martin's hospital insurance policy. *Id.* Mr. Martin refused to pay the remaining amount due, and in the subsequent contempt action brought by Mrs. Martin, the lower court agreed

reasonably necessary to protect the health and welfare of the minor child.[32] Finally, in the area of contempt for nonpayment of child support, the supreme court delineated a minimal two-part procedure satisfying a prima facie case for delinquent support: introducing into evidence a copy of the initial support judgment together with proof of the contemner's failure to comply with the order.[33]

B. Shared Parental Responsibility

1. Termination of Parental Rights

In *Veselits v. Cruthirds*,[34] the Mississippi Supreme Court held that the murder of one parent by the other did not result in the automatic termination of the parental rights of the surviving parent.[35] In *Veselits*, the child's father shot and killed his wife[36] and was subse-

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that such costs were precluded from the meaning "medical expenses." *Id.* Reversing the decision, the supreme court began by reviewing past precedent equating the services of a psychologist with that of a psychiatrist. *Id.* at 166-67 (citing Lanier v. State, 533 So. 2d 473 (Miss. 1988); Glen v. State, 439 So. 2d 678 (Miss. 1983); Greenlee v. State, 437 So. 2d 1010 (Miss. 1983)).

[32] *Id.* at 677. The fact that the child needed and received the treatment and that Mr. Martin did not object to the child's institutionalization was undisputed. *Id.* at 765-66. However, Mr. Martin had asked in writing that the child's mother seek centers offering treatment for free if costs exceeded the ceiling on his insurance policy. *Id.* at 766.

[33] Hinton v. Guthrie, 537 So. 2d 886, 888 (Miss. 1989). The court refused to treat a contempt action as one on an open account but also rejected a procedure placing the sole burden on the plaintiff to provide the exact delinquent amount. *Id.* at 887.

[34] 548 So. 2d 1312 (Miss. 1989).

[35] *Veselits*, 548 So. 2d at 1316. The chancellor claimed that this was a case of first impression. *Id.* at 1314. However, in Shoemake v. Davis, 216 So. 2d 420 (Miss. 1968), which was not mentioned in the *Veselits* decision, the Supreme Court faced a similar, but not analogous, fact situation. In *Shoemake*, the father of two minor children pled guilty to the murder of his wife and was sentenced to life imprisonment. *Id.* at 421. The chancellor entered decrees authorizing the adoption of the two children by their maternal grandparents, and the father appealed. *Id.* at 420. The supreme court affirmed the chancellor's finding that the father was morally and otherwise unfit to have custody, and in doing so relied, not solely, but with particularity, on the depraved circumstances surrounding the attempted concealment of the murdered mother's body. *Id.* at 421. *Shoemake* did not directly discuss the issue presented in *Veselits*, which appears to clarify, rather than contradict, the *Shoemake* decision.

[36] *Veselits*, 548 So. 2d at 1313. Robert Veselits and Shari Cruthirds were married for 14 months when Shari joined the United States Air Force despite her husband's disapproval. *Id.* During basic training, the couple argued over the telephone and Robert threatened to file for divorce and take custody of Stephine, the only child of the marriage. *Id.* After basic training, Shari was assigned to Keesler Air Force Base in Biloxi, Mississippi, and she and the minor child moved in with her parents. *Id.* Her husband remained at the marital domicile in Bossier City, Louisiana. *Id.* Shortly thereafter, Shari

quently convicted and pardoned of the crime of manslaughter.[37] At the time of the shooting the child had been living with her maternal grandparents to whom the chancellor awarded full custody without severing the parental rights of the child's father who was himself awarded liberal but supervised visitation rights.[38] The supreme court rejected the father's argument that the pardon precluded consideration of his crime in the custody proceeding[39] but also refused to adopt a rule recognized in other jurisdictions requiring automatic termination of his parental rights.[40]

2. Child Custody and Visitation Rights

There is a strong presumption that the best interest of a child will be served by being placed in the custody of his or her natural parent whose custodial right should prevail over all third parties.[41] However,

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returned to Bossier City to collect a few belongings and was confronted by her husband who accused her of adultery and in an angry rage shot her twice in the stomach. *Id.* Shari died before reaching the hospital. *Id.*

[37] *Id.* at 1314. A jury convicted Robert of manslaughter and sentenced him to nine years in the Louisiana Department of Corrections, but Governor Edwards pardoned him, despite opposition from the prosecuting district attorney and the chief of police. *Id.*

[38] *Id.* at 1315. The action for custody of Stephine was filed by her father and paternal grandmother, Robert and Nina Veselits, against her maternal grandparents, Erie and Laneeta Cruthirds. *Id.* at 1313. Aside from the homicide itself, the chancellor considered a multitude of other factors including the lack of rapport between the father and his child prior to the killing, the bonding of the child to her maternal grandparents, and the father's questionable credibility and lack of remorse. *Id.* at 1313-14. Robert did not abandon the child but he was morally and mentally unfit to be awarded custody. *Id.*

[39] *Id.* at 1316. This was Robert's primary assignment of error on appeal. *Id.*

[40] *Id.*; *see, e.g.*, Gillespie v. Bailey, 397 So. 2d 130, 132 (Ala. 1980) (incarceration for unlawful killing of child's mother indicated father's abandonment); *In re* Sanders, 420 So. 2d 790, 791 (Ala. App. 1982) (father's beating children's mother to death in children's presence resulted in termination of his parental rights); George v. Anderson, 217 S.E.2d 609, 610-11 (Ga. 1975) (father lost all parental rights when he killed mother and maternal grandmother); Sturkie v. Skinner, 104 S.E.2d 417, 422 (Ga. 1958) (father's alleged poisoning of mother sufficient to justify change in custody); Brown v. Department of Human Resources, 276 S.E.2d 155, 157 (Ga. App. 1981) (father unfit to have custody after intentionally killing mother); *In re* Ditter, 322 N.W.2d 642, 645 (Neb. 1982) (parental rights not terminated solely because of incarceration; but killing mother mandated severance).

[41] Naveda v. Ahumada, 381 So. 2d 147, 149 (Miss. 1980) (custody of child was properly awarded to fit mother rather than to maternal grandparents); Bond v. Bond, 355 So. 2d 672, 674 (Miss. 1978) (chancellor committed error by awarding custody to paternal grandparents when parents were not deemed unfit); Kees v. Fallen, 207 So. 2d 92, 94-95 (Miss. 1968) (legal presumption favored natural parent as against collateral relatives); Pace v. Barrett, 205 So. 2d 647, 649 (Miss. 1968) (fit parent had natural right to custody

this presumption is not without exception.[42] Custodial contests involving third parties most often arise between a natural parent and the maternal or paternal grandparents,[43] and in 1989, two such suits were appealed to the Mississippi Supreme Court. In *Collins v. Smith*,[44] the court reversed a chancellor's decision granting custody of two minor children to their paternal grandmother[45] but in *Collins v. Lowndes*

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of child); MISS. CODE ANN. § 93-13-1 (Supp. 1989) (parental guardianship of minor children); MISS. CODE ANN. §§ 93-15-101 to -111 (Supp. 1989) (termination proceedings).

[42] *See* Moody v. Moody, 211 So. 2d 842, 844 (Miss. 1968) (chancery court had power to award child to third party not party to divorce action when both parents were deemed unfit); Mahaffey v. Mahaffey, 176 Miss. 733, 740, 170 So. 289, 292 (1936) (policy of law to award custody to natural parents overcome when parents were clearly unfit).

[43] *See, e.g., Veselits*, 548 So. 2d at 1316; *supra* notes 34-40 and accompanying text.

[44] 555 So. 2d 73 (Miss. 1989).

[45] *Collins*, 555 So. 2d at 73. Two children were born of the marriage of Billy Smith and Janice (Smith) Collins, who later divorced, Janice being granted legal custody of both children. *Id.* For almost three years thereafter, Janice and the minor children continued living in Mississippi with Billy's parents until Janice moved to Alabama where she subsequently married Phil Collins. *Id.* Janice permitted the children to visit Billy's parents for the summer, but they refused to return them; and Irene Smith, the children's paternal grandmother, filed suit in Mississippi to obtain legal custody. *Id.* The chancellor deemed Janice morally unfit to have custody of the children, awarded custody to Irene Smith, and granted Janice visitation rights on alternate weekends. *Id.*

As a preliminary matter, the supreme court determined that Mississippi had concurrent jurisdiction with Alabama to decide the issue under the provisions of the mutually-enacted Uniform Child Custody and Jurisdiction Act (UCCJA), MISS. CODE ANN. § 93-23-5(1)(b) (Supp. 1989). *Collins*, 555 So. 2d at 73. Both Mississippi and Alabama had strong interests in the children involved, and it was therefore not erroneous for Mississippi to accept jurisdiction over the matter. *Id.*

The Mississippi Supreme Court decided two other cases in 1989 requiring an interpretation of the UCCJA: In Castleberry v. Castleberry, 541 So. 2d 457, 457 (Miss. 1989), the parties were divorced in Mississippi and the custodial parent later moved to California. *Id.* During the children's summer visitation in Mississippi, the noncustodial parent filed suit seeking modification of the prior custody order. *Id.* at 458. The custodial parent attempted to transfer the case to California, but the chancellor refused and the Mississippi Supreme Court affirmed, holding that personal and subject matter jurisdiction was proper in Mississippi under the statutory provision granting such jurisdiction in emergency situations. *Id.* at 461; *see* MISS. CODE ANN. § 93-23-5(1)(c)(ii) (Supp. 1989) (granting jurisdiction to Mississippi when child needs emergency protection).

In Carpenter v. Allen, 540 So. 2d 1334 (Miss. 1989), subsequent to the parties being divorced in Ohio, the custodial parent moved to Mississippi, and the noncustodial parent relocated to Alabama. *Id.* at 1335. The custodial parent procured a judgment transferring jurisdiction from Ohio to Mississippi and filed suit in Mississippi to increase child support. *Id.* The Mississippi Supreme Court affirmed the lower court's dismissal of the action for lack of personal jurisdiction. *Id.* at 1336-37; *see* MISS. CODE ANN. § 93-23-3(c) (Supp. 1989) (excluding child support matters from coverage of UCCJA).

County Public Welfare Department,[46] affirmed a youth court order granting temporary custody to the maternal grandparents.[47] In the former case, the supreme court held that the natural mother was not proved to be unfit[48] but in the latter abided by the youth court's determination that the children had been neglected.[49]

In a related issue, the Mississippi Supreme Court in *Howell v. Rogers*[50] had its first opportunity to interpret the legislature's 1986 amendment of the Grandparent's Visitation Rights Statute.[51] In

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[46] 555 So. 2d 71 (Miss. 1989).

[47] *Lowndes County*, 555 So. 2d at 71. The Lowndes County Public Welfare Department alleged that Mrs. Collins' two minor children were neglected. *Id.* The trial court agreed, awarded custody of the children to the paternal grandparents for three months, ordered Mrs. Collins to attend parenting classes, and awarded her liberal visitation rights. *Id.*

[48] *Collins*, 555 So. 2d at 73. To overcome the presumption in favor of Janice, the natural parent, the petitioner had to show that Janice either (1) abandoned the children, (2) engaged in conduct so immoral as to be detrimental to the children, or (3) was mentally or otherwise unfit to have custody. *Id.* Because she failed to prove any of the above, the court remanded the case for further consideration. *Id.* The court also held that the visitation awarded to Janice was unreasonable. *Id.*

[49] *Lowndes County*, 555 So. 2d at 71. The court made clear that it affirmed only the order for a temporary change in custody and refused to comment on whether Mrs. Collins was fit to have permanent custody. *Id.*

The court admonished the Lowndes County Public Welfare Department for failing to file a brief in this matter and except for the fact the trial court revealed no manifest error, would have treated this omission as a confession of error. *Id.*; *see In re* R.T., 520 So. 2d 136, 138 (Miss. 1988) (admonishing state for failing to file brief in appeal from youth court).

[50] 551 So. 2d 904 (Miss. 1989).

[51] MISS. CODE ANN. §§ 93-16-1 to -7 (Supp. 1989) (effective July 1, 1983). Without these statutes, grandparents would not have any visitation rights because of the common-law rule recognizing the superior rights of the natural parents to have custody of their children and because of the conflict of authority created when third parties are awarded visitation privileges. *See* Naveda v. Ahumada, 381 So. 2d 147, 149 (Miss. 1980) (grandparents not entitled to visitation privileges where fit parent was awarded custody); Turner v. Turner, 331 So. 2d 903, 904 (Miss. 1976) (fact that child lived with grandparents in more favorable environment was insufficient to remove mother's legal rights).

Sections 93-16-3 and 93-16-7 were amended by the Mississippi Legislature in response to Olson v. Finn, 484 So. 2d 1015, 1017 (Miss. 1986), in which the supreme court construed the pre-amendment statutes as requiring termination of the visitation rights of the natural grandparents when the child was adopted by a step-parent, except as to the surviving natural parent. *Id.* at 1018. The court in *Howell* regretted the harshness of the *Olson* decision as dictated by statute and approved its legislative reversal. *Howell*, 551 So. 2d at 905-06.

Section 93-16-7, as amended, provides in pertinent part, as follows:

> (4) This chapter shall not apply to the granting of visitation rights to the natural grandparents of any child who has been adopted by order or decree of

Howell, the paternal grandparents of a minor child who had been adopted by his stepfather unsuccessfully petitioned the chancery court for visitation rights.[52] The chancellor insisted that the grandparents lacked standing,[53] but the supreme court reversed, holding that a half-adoption did not necessarily terminate the visitation rights of the parents of the parent whose rights had been severed.[54]

Visitation privileges for noncustodial parents are more highly respected than those for grandparents and, such being the case, are considered within the best interest of the child even when the parent is guilty of gross misbehavior.[55] Depending on the circumstances, Mississippi courts have limited the right rather than totally removed it, as for example, in *Rakestraw v. Wheeler*,[56] where the father was awarded limited visitation rights even though he had absconded with the two minor children of the marriage immediately after being served with his wife's divorce complaint.[57] When seventeen months later the children

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any court *unless one (1) of the legal parents of such child is also a natural parent of such child.* This chapter shall apply to persons who become grandparents of a child by virtue of adoption.

Id. (amended material emphasized). The original act was adopted in 1983 in reaction to a Congressional pronouncement calling for legislation to protect the rights and privileges of grandparents to visit their grandchildren. *See* H.R. Con. Res. 45, 98th Cong., 1st Sess. (1983). The resulting Mississippi legislation did not extend the privilege to its furthermost reaches but instead limited the grandparents' rights to situations where a natural parent lost his parental rights either because he died or because his rights were terminated in a court proceeding. MISS. CODE ANN. §§ 93-17-1 to -7.

[52] *Howell*, 551 So. 2d at 905. The natural parents of the child were divorced and the court awarded custody to the natural mother who subsequently remarried. *Id.* The natural mother and stepfather adopted the child. *Id.* After the natural father died, the paternal grandmother and step-grandfather filed suit seeking visitation rights. *Id.*

[53] *Id.* The chancellor relied on the court's decision in *Olson*, 484 So. 2d at 1017, without regard to the legislative amendments and held that such visitation could not be court-ordered but should be voluntarily granted. *Howell*, 551 So. 2d at 905.

[54] *Howell*, 551 So. 2d at 906. The court perceived the 1986 amendments as directly overruling *Olson*. *Id.*

[55] Webb v. Webb, 391 So. 2d 981, 983 (Miss. 1980) (court was manifestly wrong in denying visitation rights to mother who was allegedly dating married man); Pearson v. Clark, 382 So. 2d 482, 483 (Miss. 1980) (affirming rights of father of illegitimate child to enforce visitation privileges); Gatlin v. Gatlin, 248 Miss. 868, 871, 161 So. 2d 782, 783 (1964) (awarding reasonable visitation to noncustodial mother).

[56] 543 So. 2d 174 (Miss. 1989).

[57] *Rakestraw*, 543 So. 2d at 175. Mr. Rakestraw was personally served with process while recovering in an alcohol rehabilitation center. Immediately following his voluntary confinement, he left the state with his two minor children but made secret trips back to Mississippi to monitor surreptitiously his wife's divorce proceedings. *Id.* In the meantime, the chancellor granted the divorce and awarded custody to Mrs. Rakestraw. *Id.*

were finally returned to the state, the chancellor awarded the absconding father visitation rights, and the supreme court affirmed.[58]

Two cases arose during the survey period questioning the moral fitness of a parent engaged in an intimate adult relationship to have overnight visitation with a minor child and to maintain custody of a minor child in defense of a modification proceeding. In *Smith v. Smith*,[59] the supreme court held that a custodial mother was justified in refusing to allow her children to visit overnight with their father where the father was living with a woman not his wife.[60] In *Phillips v. Phillips*,[61] however, the supreme court once again refused to hold that a custodial parent's indiscretions by themselves warranted modification of a child custody order.[62]

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[58] *Id.* at 176. Mr. Rakestraw was finally arrested in Tulsa, Oklahoma. *Id.* at 175. The chancellor had retained jurisdiction over the final divorce decree and based on this provision found Mr. Rakestraw in willful contempt and ordered him to pay almost $4000 in back child support plus $15,000 for expenses incurred in locating and gaining custody of the children. *Id.* at 176. The trial court required Mr. Rakestraw to post a ne exeat bond to maintain his presence in the state and awarded him visitation rights to take place in the children's grandparents' home, the first overnight visitation to occur within a year. *Id.* Mr. Rakestraw argued on appeal that the chancellor limited his visitation rights to punish him for leaving the state and that this was impermissible under the supreme court's decision in Crowson v. Moseley, 480 So. 2d 1150 (Miss. 1985). *Rakestraw*, 543 So. 2d at 176.

[59] 545 So. 2d 725 (Miss. 1989).

[60] *Smith*, 545 So. 2d at 728. The parties had been granted an irreconcilable differences divorce, and their agreement gave Mrs. Smith custody of the minor child and Mr. Smith weekend visitation every month. *Id.* at 725-26. The agreement further provided, as follows: "Husband and Wife agree that neither party will take the minor child into an environment of an immoral nature and that each of them will maintain said child in a sober and healthy environment in the best interest of the child." *Id.* at 726. Mr. Smith admitted that from the time of his divorce he lived with a woman whom he eventually married. *Id.* Nevertheless, Mrs. Smith testified that she acted under a good faith belief that her ex-husband had not remarried and that therefore her behavior could not be labeled as contumacious. *Id.* at 726-27. The supreme court agreed with the lower court's refusal to hold Mrs. Smith in contempt but nonetheless condemned her flagrant disobedience of the chancery court's order. *Id.* at 726-28. The supreme court noted that Mississippi courts in general should, and do, adopt a lenient view in contempt proceedings. *Id.* at 727; *see* Brown v. Gillespie, 465 So. 2d 1046, 1048 (Miss. 1985) (obligor was in arrears in child support but not held in contempt); Walters v. Walters, 383 So. 2d 827, 829 (Miss. 1980) (upholding decision failing to find obligor in contempt for willful failure to pay child support).

[61] 555 So. 2d 698 (Miss. 1989).

[62] *Phillips*, 555 So. 2d at 698. Mr. and Mrs. Phillips executed a property settlement agreement which was incorporated into a final divorce decree. *Id.* at 699. Mrs. Phillips was awarded custody of their only child. *Id.* Mr. Phillips filed to modify the above custody provision when he discovered that his ex-wife was dating Billy Ray Coe, whom she

C. Divorce

Under section 93-5-2 of the Mississippi Code,[63] a divorce sought on the grounds of irreconcilable differences requires neither proof nor testimony, and in *Bullard v. Morris*,[64] the supreme court held that a chancellor abused his discretion when he refused to grant a divorce in a pro se proceeding because of the inability of either party to personally appear in court.[65] In *Bullard*, the husband was serving a ten-year jail sentence, and his wife lived in California.[66] The Mississippi Supreme Court first determined that the state constitution protected a person's right to represent himself in a civil proceeding[67] and that nothing in the statutes required the personal appearance of either party.[68] Therefore, because of the difficulty involved in procuring the husband's attendance, the chancellor should have evaluated the proposed divorce decree or in the alternative sought the possibility of pro bono representation.[69]

D. Alimony

In 1989, the Mississippi Supreme Court rendered numerous noteworthy decisions pertaining to the wife's right to an equitable division of marital property when her economic contributions were nonmone-

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has since married. *Id.* Coe had on occasion spent the night at Mrs. Smith's home, and Mr. Smith argued that these visitations adversely affected the child and even caused the child to fail second grade. *Id.* at 699-700. Mrs. Smith countered that the child was actually happier and his school work had vastly improved since the time of the divorce. *Id.* at 700. Nevertheless, the chancellor modified his prior judgment by awarding custody to Mr. Smith. *Id.* at 699.

[63] MISS. CODE ANN. § 93-5-2 (Supp. 1989).

[64] 547 So. 2d 789 (Miss. 1989).

[65] *Bullard*, 547 So. 2d at 791-92. Mr. Bullard filed the appropriate pleadings and after receiving no response from the court for more than the required 60-day waiting period, asked the chancery clerk to check the status of his case and was then informed that the chancellor required the attendance of one of the parties or of their attorney. *Id.* at 790.

[66] *Id.* at 790. The court noted with some emphasis that much time and effort on the part of law enforcement would have to be expended to procure Mr. Bullard's appearance. *Id.* at 791.

[67] *Id.* at 790; *see* MISS. CONST. art. 3, §§ 24, 25 (guaranteeing right to represent oneself and to pursue court action).

[68] *Id.* at 791. The supreme court refused to hold MISS. UNIF. CH. CT. R. 8.04 applicable in pro se proceedings, even though the rule specifically requires the appearance of an attorney in an irreconcilable differences divorce. *Bullard*, 54 So. 2d at 791.

[69] *Bullard*, 547 So. 2d at 792.

tary and almost exclusively domestic in nature.[70] In *White v. White*,[71] the court reversed as inadequate a chancellor's order granting the wife, Mrs. White, a monetary award representing not more than 3.3% of her husband's separate estate.[72] The couple's assets had substantially increased during their nineteen-year marriage, and notwithstanding conflicting testimony regarding Mrs. White's involvement in Mr. White's real estate business,[73] the uncontradicted evidence showed that Mrs. White had promoted the business through her home and social life and that these activities were instrumental in attaining the parties' increased wealth.[74] Therefore, relying on its recent decision in *Jones v. Jones*,[75] the court determined that Mrs. White was entitled to an equi-

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[70] Two decisions rendered by the Mississippi Supreme Court in 1989 and related to the above subject matter but not discussed elsewhere involved a wife's entitlement to an award of separate maintenance and the authority of the court to correct erroneous mathematical calculations for past-due alimony payments.

In Robinson v. Robinson, 554 So. 2d 300 (Miss. 1989), the supreme court reversed an award of separate maintenance because the wife's conduct caused and justified the parties' separation. *Id.* The doctrine of separate maintenance was itself constitutionally attacked on appeal as violating equal protection, U.S. CONST. amend. XIV, cl. 2, but the court refused to address the issue since the award was set aside for the above-mentioned reasons. *Robinson*, 554 So. 2d at 300.

In Shearer v. Shearer, 540 So. 2d 9 (Miss. 1989), a chancellor had erroneously awarded double recovery of alimony in a contempt action as well as payment for other expenses not otherwise assumed by the ex-husband. *Id.* The supreme court recalculated the sums owing and affirmed the chancellor's decisions as modified. *Id.*

[71] 557 So. 2d 480 (Miss. 1989).

[72] *White*, 557 So. 2d at 482. During the parties' marriage, Mrs. White's assets increased from almost $13,000 to over $500,000; Mr. White's, from almost $590,000 to almost $1.2 million. *Id.*

[73] *Id.* at 483-84. Mrs. White testified that she encouraged her husband to expand his real estate business and that upon her encouragement, Mr. White constructed an apartment complex which she helped design and decorate. *Id.* Mrs. White received no salary for this work, and other testimony indicated that she had had no other involvement in the business. *Id.* However, shortly after their marriage, Mrs. White had obtained her real estate license and had sold properties, a portion of the sales commission from which went to the company. *Id.* at 483. Before this time, she had quit her job elsewhere to perform clerical work for her husband. *Id.*

[74] *Id.* at 483. Mr. White's health began to fail in the last few years of marriage, and Mrs. White assumed the dutiful role of nursemaid. *Id.* at 484. Throughout their marriage, however, Mrs. White entertained her husband's business associates, joined many organizations, including the Jackson Yacht Club, Mississippi Art Association and Jackson Symphony Orchestra Association, and maintained the marital domicile as a showplace for the community. *Id.* at 481.

[75] 532 So. 2d 574 (Miss. 1988). In *Jones*, the supreme court affirmed a 50-50 equitable distribution of marital property and recognized that the wife's domestic services had "an economic value as real as cash contributions." *Jones*, 532 So. 2d at 580 (quoting Pickens v. Pickens, 490 So. 2d 872, 876 (Miss. 1986)). *See Family Law—Marital Prop-*

table portion of the parties' accumulated wealth which was not fairly represented by the lump-sum awarded.[76]

Similarly, the supreme court in *Robinson v. Irwin*,[77] although refusing to require by law an equal division of marital property, nonetheless found the court-ordered division so inadequate as to require reversal.[78] In *Robinson*, the wife had almost unilaterally provided for the couple's financial support during her husband's three-year enrollment in law school and yet the chancellor had awarded the wife only $5,400 in lump-sum alimony.[79]

Finally, in *Johnson v. Johnson*,[80] the supreme court affirmed a partition order requiring the appraisal and sale of the parties' marital domicile, the proceeds from which the court ordered to be equally divided between the parties.[81] The chancellor made no other provision for permanent alimony, and the supreme court reasoned that since Mrs. Johnson would have been entitled to a lump-sum alimony award in an amount equal to half the value of the home, it was not an abuse of discretion to order the partition.[82]

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erty Distribution—Where Divorcing Spouse Contributed to Joint Accumulation of Real Property Court-Ordered Divestment of Title Was Equitable, 59 MISS. L.J. 591 (1989) (authored by Betty Mallett) (discussing abrogation of title theory and advocating equal division of marital property based solely on domestic services).

[76] *White*, 557 So. 2d at 485. The supreme court concluded that Mrs. White's contributions were simply worth more than 3.3% of her husband's accumulated wealth, *id.*, especially considering the disparity in the parties' separate estates. *Id.* at 483 (quoting Cheatham v. Cheatham, 537 So. 2d 435, 438 (Miss. 1988)).

[77] 546 So. 2d 683 (Miss. 1989).

[78] *Robinson*, 546 So. 2d at 685-87. Mrs. Irwin, formerly Mrs. Robinson, had argued that all personal property acquired after the marriage was common to the marriage and should have been equally divided between the parties. *Id.* at 684. Citing Dillon v. Dillon, 498 So. 2d 328 (Miss. 1986), the supreme court rejected this argument. *Irwin*, 546 So. 2d at 685.

[79] *Robinson*, 546 So. 2d at 683-84. Mrs. Irwin had contributed $28,000 to her husband's education and after his graduation had contributed almost $18,000 to savings accounts and IRAs, as well as $1200 to open his law office. *Id.* at 686.

[80] 550 So. 2d 416 (Miss. 1989).

[81] *Johnson*, 550 So. 2d at 419. In 1982, Mr. Johnson had received $220,000 in settlement of a tort claim and had used a portion of these proceeds to renovate and pay the remaining mortgage on the parties' home. *Id.* at 418. On appeal, Mr. Johnson argued that the court-ordered partition was unreasonable because his wife had made no separate cash contribution to the acquisition of this property. *Id.* at 419-20.

[82] *Id.* at 420-21. The supreme court reasoned that because under MISS. CODE ANN. § 93-3-1, -3 (1972), a married woman is authorized to bring a separate action against her husband for partition of jointly-held property, there was no reason to prevent her from seeking the same relief incidental to a divorce action. *Johnson*, 550 So. 2d at 418. The court stressed Mrs. Johnson's non-monetary economic contributions as justification for

E. Paternity

During the 1989 survey period, the Mississippi Supreme Court issued only two opinions pertaining to paternity, neither of which involved substantive issues. First, in *Atwood v. Hicks*,[83] the court reversed a chancellor's refusal to dismiss a paternity action where the putative father had in an earlier proceeding negotiated a settlement with the mother, appointed by the court as the child's guardian.[84] The previous settlement had been court-approved, and the action had been dismissed with prejudice.[85] Nevertheless, the child filed a new complaint for paternity and argued that the earlier settlement was void because public policy prohibited a compromise of claims for paternity and support and because the prior court proceeding was allegedly tainted by fraud.[86] The supreme court upheld the validity of the prior court action in approving and settling the paternity action and hinted that the proper course of action to attack the decree on the basis of fraud or collusion was to bring suit in the court that originated the

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the partition order. *Id.* at 420.

Mr. Johnson had asserted as an alternate ground for appeal the inadequacy of his wife's pleadings. *Id.* at 419. In her counterclaim, Mrs. Johnson had asked for permanent alimony and had not demanded compensation for her equitable interest in the marital home until she filed an amendment which nonetheless still failed to include as a demand for equitable relief an order for partition. *Id.* Notwithstanding Miss. R. Civ. P. 54(c) limiting a final judgment to the monetary amount demanded in the initial or amended pleadings, the supreme court reasoned that Mr. Johnson should have reasonably anticipated from the language of his wife's pleadings that she was seeking the marital residence as a source of monetary award. *Johnson*, 550 So. 2d at 420.

A similar contention was likewise unsuccessfully raised in Queen v. Queen, 551 So. 2d 197 (Miss. 1989). In *Queen*, the chancellor entered a final judgment for divorce granting the wife lump-sum alimony even though her original complaint did not request such relief. *Id.* To rectify the omission, Mrs. Queen moved to amend her complaint under Miss. R. Civ. P. 15(b) but again failed to demand a specific amount of alimony. *Queen*, 551 So. 2d at 197. Nonetheless, the supreme court upheld the award and concluded (1) that Rule 54(c) did not impose an impediment to a Rule 15(b) amendment permitted after entry of a final judgment since Rule 54(c) specifically contemplated amended pleadings, and (2) that although Rule 54(c) prohibited judgment for a monetary amount greater than that demanded, it did not abrogate the widespread practice of demanding an unspecified amount couched in language such as "an amount deemed by the court to be fair and equitable under the circumstances." *Queen*, 551 So. 2d at 197.

[83] 538 So. 2d 404 (Miss. 1989).

[84] *Atwood*, 538 So. 2d at 405. Ms. Hicks, the child's unwed mother, filed a petition to determine paternity and alleged that Mr. Atwood was the child's father. *Id.* The parties settled the suit for $18,000. *Id.* at 406.

[85] *Id.* at 406. Hicks obtained letters of guardianship and the court's approval to settle the claim. *Id.*

[86] *Id.* at 407. Ms. Hicks filed the complaint as the child's next friend. *Id.* at 406.

settlement.[87]

In the second case, *Thornton v. Shows*,[88] the putative father appealed an adjudication of paternity and assigned as error the introduction into evidence of certain testimony offered as proof of the child's paternity.[89] The mother had testified that various members of defendant's family had visited with the child and had exhibited signs of affection toward the child.[90] The supreme court agreed that such evidence constituted inadmissible hearsay[91] but held that the defendant had waived his objection by introducing testimony on the same proposition.[92]

II. INSURANCE

The Mississippi Supreme Court rendered decisions concerning health, fire, general liability, and uninsured motor vehicle insurance during 1989. Three of these cases brought allegations of bad faith against the insurance company concerned.[93] In two instances, the court determined that the insurance company acted reasonably under the facts and circumstances so that there was neither action nor inaction which constituted an independent tort.[94] The third case was remanded

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[87] *Id.* at 408. The court considered together Mississippi's guardianship statutes, MISS. CODE ANN. § 93-13-59 (1972) and its Uniform Law on Paternity, MISS. CODE ANN. § 93-9-49 (1972), to conclude that the legislature had granted concurrent jurisdiction over settlement of paternity claims. *Atwood*, 538 So. 2d at 406-07.

[88] 537 So. 2d 1363 (Miss. 1989).

[89] *Thornton*, 537 So. 2d at 1365. Nora Shows had filed a complaint for adjudication of paternity and an order of filiation against Vince Thornton. *Id.* at 1363. Ms. Shows alleged that Mr. Thornton was the father of her child and prayed that he be required to pay all reasonable expenses of pregnancy, confinement and support. *Id.* Mr. Thornton answered the complaint with a general denial and demanded a jury trial, at the conclusion of which a verdict was returned naming Mr. Thornton as the child's father. *Id.*

[90] *Id.* at 1365. Over Mr. Thornton's objections, the trial court allowed Ms. Shows to testify that his parents were present during the delivery of the child and that his brothers and sisters had also visited with the child. *Id.*

[91] *Id.* The court held that the family's displays of affection toward the child were tantamount to a non-verbal assertion that Thornton was indeed the child's father. *Id.*; *see* MISS. R. EVID. 801(a) (recognizing that non-verbal conduct could amount to verbal assertion under hearsay rule).

[92] *Thornton*, 537 So. 2d at 1366. Thornton's mother testified on her son's behalf that her actions were motivated by a mistaken belief that the child was her grandson. *Id.*

[93] South Carolina Ins. Co. v. McKenzie, 547 So. 2d 25 (Miss. 1989); Cossitt v. Nationwide Mut. Ins. Co., 551 So. 2d 879 (Miss. 1989); Cossitt v. Federated Guaranty Mut. Ins. Co., 541 So. 2d 436 (Miss. 1989).

[94] *McKenzie*, 547 So. 2d at 29, 25. In *McKenzie* the court held that an insurer's reliance on information from the insured's attorney and the insured's policy and applica-

for additional facts necessary to that determination.[95]

The court's rulings in two cases brought under section 83-11-103(c) of the Mississippi Code[96] more specifically interpreted the definition of "uninsured motor vehicle" as set forth in the statute. In *Washington v. Georgia American Insurance Co.*,[97] a man injured while a passenger in a vehicle sought recovery under his own uninsured motorist insurance for the difference between what he recovered as his share of the driver's uninsured motorist liability coverage and his own policy limit.[98] He was denied additional recovery since the vehicle concerned did not fit the statutory definition of uninsured motor vehicle.[99] In its analysis, the court focused on the plain language of the statute, which couches its definition in terms of limits of liability of coverage and is not concerned with the actual payment received by an injured party.[100] The court further applied this line of reasoning in *Cossitt v. Federated Guaranty Mutual Insurance Co.*[101] when it denied recovery under section 83-11-103(c) to one who received no liability payment because the available funds under the applicable liability policy had been exhausted.[102]

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tion was neither unreasonable nor such a malicious, willful, or grossly negligent act so as to constitute an independent tort when the allegations were breach of contract and breach of fiduciary duties. *Id.* at 28-29. In *Nationwide*, the petitioners' bad faith allegation arose from the insurer's failure to provide petitioners with a copy of the policy which they contended amounted to an attempt to create the fact of coverage; but the court disagreed since the insurer let one claimant see the policy and sent another a letter setting out the relevant provision. *Nationwide*, 551 So. 2d at 885.

[95] *Federated Guaranty*, 541 So. 2d at 436. In this case, the insurer admitted in its brief that the condition precedent to its obligation to pay was met, but the record showed no reason for its failure to pay. *Id.* at 445. The court held that the evidence was insufficient to support a grant for summary judgment. *Id.*

[96] MISS. CODE ANN. § 83-11-103(c) (Supp. 1989).

[97] 540 So. 2d 22 (Miss. 1989).

[99] *Washington*, 540 So. 2d at 23. Washington's share of the $20,000 per accident liability limitation was $463.34. *Id.* He sought an additional $9,536.66 from his own insurer as the difference between the $10,000 per person policy limit and his actual receipt from the driver's insurer. *Id.*

[99] *Id.* at 25. Both the vehicle involved and Washington carried liability policies with limits of $10,000 per person and $20,000 per accident. *Id.* at 23.

[100] *Id.* at 24-25; *see* Wickline v. U.S. Fidelity & Guar. Co., 530 So. 2d 708, 712 (Miss. 1988) (uninsured status determined by comparing amount of uninsured motorist coverage available to the amount of liability insurance available); State Farm Mut. Auto. Ins. Co. v. Kuehling, 475 So. 2d 1159, 1163 (Miss. 1985) (uninsured motorist carrier cannot require offset payments from tortfeasor's liability carrier when tortfeasor and insured have equal liability limits).

[101] 541 So. 2d 436 (Miss. 1989).

[102] *Federated Guaranty*, 541 So. 2d at 440. The court's discussion gave five reasons

In *Cossitt v. Nationwide Mutual Insurance Co.*,[103] the court permitted stacking of policy limits of uninsured motorist coverage for recovery by passengers injured or killed in an accident involving one of three buses owned by a church, all of which were covered by a liability policy.[104] The court found that the policies involved were not commercial policies providing coverage for a fleet of vehicles[105] and noted that Mississippi has not yet been confronted with the possibility of stacking in a business or commercial policy.[106]

The court decided two cases in which standard fire policy clauses were construed. In *Allison v. State Farm Fire & Casualty Co.*,[107] the insureds under a fire policy refused to answer questions concerning their financial status or to provide financial records when requested to do so by the insurer.[108] After the insurer refused to pay, the insureds filed suit seeking payment up to their policy limits and damages for mental anguish as well as punitive damages.[109] The Mississippi Supreme Court upheld the lower court's grant of summary judgment for the insurer.[110] According to the court, an allegation of arson was not necessary to establish the materiality of financial status questions following a fire loss claim.[111] Because of the contractual nature of the relationship, claimants under such contract are required to respond to all reasonable inquiries and to give all reasonable assistance.[112] The rule concerning preclusion of coverage for failure to submit to examination

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for its holding: (1) the intent behind the statute appeared to assure availability of minimum coverage for each accident, not for each injured person; (2) allowing recovery per person would convert uninsured motorist coverage into an "open-ended" policy, at least to the extent of coverage; (3) the state legislature gave motorists the option to purchase excess coverage beyond the statutory minimum; (4) due regard for the differing functions of the legislative and judicial branches prevented a rewriting of the statute; and (5) the legislature considered this result by providing the definition of "uninsured motorist vehicle" in § 83-11-103(c)(ii). *Federated Guaranty*, 541 So. 2d at 440-42.

[103] 551 So. 2d 879 (Miss. 1989).

[104] *Nationwide*, 551 So. 2d at 884.

[105] *Id.* The court noted that many individuals have from three to seven vehicles on one policy for family use. *Id.*

[106] *Id.*

[107] 543 So. 2d 661 (Miss. 1989).

[108] *Allison*, 543 So. 2d at 662.

[109] *Id.* at 662-63. The insurer had already paid $3,000 for loss of use and $43,862.64 to the first and second mortgagees before the Allisons refused to respond to inquiries regarding finances. *Id.* at 662.

[110] *Id.* at 664.

[111] *Id.* (citing Edmiston v. Schellenger, 343 So. 2d 465, 467 (Miss. 1977)).

[112] *Id.*

under oath, a condition of the policy, was applicable.[113]

At issue in *Lumbermens Mutual Casualty Co. v. Thomas*[114] was the timeliness of notice required under a mortgage clause.[115] The court determined that the clause was uncertain and ambiguous because no time frame for the required notice was specified in the clause.[116] Therefore, the insurer had to allow a reasonable time for compliance, with reasonableness to be determined from factual considerations.[117]

The only decision rendered concerning health insurance was *State (Comprehensive Health Plan) v. Carper.*[118] In *Carper* the court held that the rule requiring manifestation of symptoms for the exclusion of a preexisting condition applied as well to those conditions deemed to be congenital.[119]

III. Wills and Estates

In 1989, the Mississippi Supreme Court rendered decisions concerning wills and estate administration wherein they clarified existing law and in so doing required strict application of the law. This was specifically true in the area of devastavit vel non with regard to the doctrine of undue influence[120] and confidential relationships[121] and the

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[113] *Id.* at 663.

[114] 555 So. 2d 67 (Miss. 1989).

[115] *Lumbermens*, 555 So. 2d at 68. The mortgage clause required the mortgagee to give notification to the insurer of any change in ownership or occupancy or of a substantial change in risk. *Id.* at 69.

[116] *Id.* at 70.

[117] *Id.*

[118] 545 So. 2d 1 (Miss. 1989).

[119] *Carper*, 545 So. 2d at 3.

[120] *In re* Estate of Harris, 539 So. 2d 1040 (Miss. 1989). In that case, the presumption of undue influence which arose because of a confidential relationship between the testatrix and devisee was successfully rebutted by proof of: (1) devisee's good faith in assisting testatrix with the preparation of the will; (2) testatrix's full knowledge and deliberation of her actions and their consequences; and (3) clear and convincing evidence that the testatrix exhibited independent consent and action. *Id.* at 1043. The court cited the three prong test established in Murray v. Laird, 446 So. 2d 575, 578 (Miss. 1984), but noted that the third prong had been redefined by the court in Mullins v. Ratcliff, 515 So. 2d 1183, 1193 (Miss. 1987). *Estate of Harris*, 539 So. 2d at 1041-42.

[121] Lowrey v. Will of Smith, 543 So. 2d 1155 (Miss. 1989). In this case, the presumption of influence which arose when a fiduciary relationship was found to exist between the testatrix and counsel who had both a personal relationship and an attorney-client relationship was not rebutted since claimant counsel failed to prove by clear and convincing evidence that the testatrix had competent, independent advice from an uninterested person. *Id.* at 1161. The court noted that where there is a commingling of the two relationships, the burden of proof placed on the attorney may be even heavier than be-

burden of proof and persuasion in those proceedings.[122] In three instances the court dealt with the rights of illegitimates and heirship proceedings under section 91-1-15 of the Mississippi Code.[123] The effect of dicta from prior decisions on the interpretation of a will[124] and conflict between the interests created by a joint tenancy and the terms of a will[125] were two other issues confronted concerning wills. In the general area of estate administration, the issues addressed by the court included appointment of an administrator and the discretion allowed the court,[126] liability of one dealing with a person adjudged non com-

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tween other persons in order to ensure the utmost in fairness and good faith. *Id.*

[122] Clardy v. National Bank of Commerce, 555 So. 2d 64 (Miss. 1989). In *Clardy* the Mississippi Supreme Court reversed and remanded because the lower court in stating its findings, misstated the law regarding which party, proponent or contestant, carried the burden of proof or persuasion in a case of devastavit vel non. *Id.* at 67. The law places the burden of persuasion as to issues of due execution and testamentary capacity on the proponent of that will, and this burden remains with the proponent at all times. *Id.* at 66; *see In re* Estate of Edwards, 520 So. 2d 1370, 1373 (Miss. 1988) (burden of persuasion never shifts to contestants). Because the court so blatantly misplaced the burden by placing it on the contestants, reversal was mandated. *Clardy*, 555 So. 2d at 67.

In *In re* Will of Dickey, 542 So. 2d 903 (Miss. 1989), the contestant of a will alleged testamentary incapacity but failed to offer proof to overcome the presumption of capacity that existed. *Id.* at 904-05. The proponent of the will was entitled to a peremptory instruction on the issue of mental capacity, and the failure to receive such instruction was reversible error. *Id.* at 906.

[123] MISS. CODE ANN. § 91-1-15 (1972).

[124] Collins v. McMurry, 539 So. 2d 127 (Miss. 1989). The court reiterated the rule that if language of a prior opinion is determined to be dicta, it has no binding effect and therefore no precedential value. *Id.* at 130 (citing Simpson v. Poindexter, 241 Miss. 854, 862, 134 So. 2d 445, 446 (1961)) (statement which qualifies as dictum is not binding). The court then noted that the language in the will that was being challenged was plain language so that the intent of the testator was evident from the face of the will, with the result that there was no need for extrinsic evidence. *Id.* at 131.

[125] *In re* Will & Estate of Strange, 548 So. 2d 1323 (Miss. 1989). In this case, the court held that a joint account with rights of survivorship established by the testator prior to executing a will was a joint tenancy which allotted control among each joint tenant so that at the death of the testator his interest vested in the remaining joint tenant. *Id.* at 1326. A subsequent will did not destroy the joint tenancy of the account so that the account came into the testator's estate, but instead the decedent's interest in the account vested on his death in the surviving joint tenant and was never subject to terms of the will. *Id.* at 1328.

[126] *In re* Estate of Moreland, 537 So. 2d 1337 (Miss. 1989). The court upheld the lower court's decision to remove an appointed administratrix and substitute another, recognizing that where the sole heir of an estate is not qualified to serve as administrator, the person preferred for the appointment under MISS. CODE ANN. § 63-15-43 (1972) is the party claiming the right to administer in a representative capacity for the sole heir. *Moreland*, 537 So. 2d at 1341. Although the substituted administratrix applied after the 30 day time frame set out in MISS. CODE ANN. § 91-7-63 (1972) for application as admin-

pos mentis[127] and the marshalling of assets for an estate.[128]

During 1989, the court made several important rulings that dealt with illegitimates and the statutory rights and responsibilities afforded them in regard to paternity and heirship proceedings under the Mississippi Code. In the case of *Estate of Robinson v. Gusta*,[129] the court held that in an heirship proceeding brought pursuant to section 91-1-15 of the Mississippi Code,[130] there is no right to a jury trial on the issue of paternity.[131] The case arose when Eric Ray Gusta, a minor child acting by and through his mother, filed suit under section 91-1-15(3)(c) of the Mississippi Code[132] for an adjudication determining him to be the sole and lawful heir of the deceased Kenneth Ray Robinson, who died intestate.[133] Robinson's estate demanded a jury trial on the issue of paternity,[134] and the chancellor empaneled one, stating, however, that any jury verdict would be advisory only.[135] Following presentation of the evidence, the jury returned a verdict denying Robinson's

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istrator, the court determined that application of § 63-15-43 was discretionary when read in conjunction with the intent and policy behind the statute. *Moreland*, 537 So. 2d at 1343.

[127] Defenbaugh & Co. v. Rogers, 543 So. 2d 1164 (Miss. 1989). Although a lender's extension of credit to one whom it had reason to know was under a guardianship but of whose non compos mentis status it had no actual knowledge was held negligent, that negligence did not rise to the level of willful disregard of borrower's rights so as to justify punitive damages award. *Id.* at 1167.

[128] *In re* Conservatorship of Kendrick v. Hancock Bank, 537 So. 2d 888 (Miss. 1989). In this case the court held that any joint assets created by the ward within the period during which it was determined that the creator of such joint assets lacked the mental capacity necessary to understand the nature and effect of any joint interest so created were deemed void and were assets of the estate to be marshalled for the conservator. *Id.* at 891. Any joint assets created prior to that period of diminished capacity were presumed valid and did not have to be forfeited to the estate simply because it was against the conservator's policy to administer joint assets. *Id.*

[129] 540 So. 2d 30 (Miss. 1989).

[130] Miss. Code Ann. § 91-1-15 (1972); *Robinson*, 540 So. 2d at 33. Since less than a year had elapsed since Robinson's death, Eric or his mother might have sued for support and maintenance under the Uniform Law on Paternity, Miss. Code Ann. §§ 93-9-9 to -15 (Supp. 1989). *Robinson*, 540 So. 2d at 33.

[131] *Robinson*, 540 So. 2d at 33.

[132] *Id.* Section 91-1-15 is in the chapter of the Code dealing with descent and distribution and is titled "Descent among illegitimates." Miss. Code Ann. § 91-1-15 (Supp. 1989).

[133] *Robinson*, 540 So. 2d at 31.

[134] Miss. Code Ann. § 91-1-15(3)(c) (1972); *Robinson*, 540 So. 2d at 32. Robinson's estate relied on Miss. Code Ann. § 93-9-15, which gives the defendant the right to demand a trial by jury. *Robinson*, 540 So. 2d at 32 (citing § 93-9-15).

[135] *Robinson*, 540 So. 2d at 32.

paternity of Eric.[136] The chancellor granted Eric's motion for a judgment notwithstanding the verdict,[137] thereby giving weight to the jury's verdict and making it more than advisory. The administratrix of Robinson's estate appealed, arguing that it was error to deny the estate a jury trial.[138]

The Mississippi Supreme court affirmed the Chancellor's finding[139] but noted that the chancellor had misapplied the appropriate review standard when treating Eric's post-trial motion as a motion for judgment notwithstanding the verdict.[140] In such an action there was no right to a trial by jury.[141] By applying the jury standard to Eric's post-trial motion, the chancellor had imposed a stricter burden than the one required by law.[142] This circumstance would usually necessitate reversal and remand.[143] However, since the chancellor found that Eric's proof met the stricter standard, it would presumptively have passed the lower but applicable standard of clear and convincing evidence, allowing affirmance based on an implied factual determination.[144]

In *Perkins v. Thompson*,[145] the court determined that the filing of a petition seeking appointment as administratrix of an intestate's estate was sufficient to meet the filing requirements for adjudication of paternity under section 91-1-15(3)(c) of the Mississippi Code.[146] This filing, coupled with the actual knowledge of those persons who would inherit if the claimant's claim failed,[147] was adequate to meet procedural requirements of sections 91-1-15(3)(c) and 91-1-27, -29.[148] The court determined that the proceeding before it was an heirship proceeding.[149] Although not initiated under any of the statutory proce-

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[136] *Id.*

[137] *Id.*

[138] *Id.* at 33.

[139] *Id.* at 34.

[140] *Id.*

[141] *Id.* at 33.

[142] *Id.* at 34.

[143] *Id.*

[144] *Id.*

[145] 551 So. 2d 204 (Miss. 1989).

[146] MISS. CODE ANN. § 91-1-15(3)(c) (1972); *Perkins*, 551 So. 2d at 208. Petitioner, Joyce Perkins, claimed to be the out-of-wedlock daughter of the decedent, Robert Taylor, who had died intestate. *Id.* at 205.

[147] *Perkins*, 551 So. 2d at 208. The decedent's wife had predeceased him, and no children had resulted from that marriage. *Id.* The interested parties who alleged that they were not noticed or served process as required by MISS. CODE ANN. § 91-1-29 (1972) were two aunts and an uncle of the decedent Taylor. *Perkins*, 551 So. 2d at 206.

[148] MISS. CODE ANN. § 91-1-15(3)(c), -27, -29 (1927), *Perkins*, 551 So. 2d at 207.

[149] *Perkins*, 551 So. 2d at 207.

dures so designated for that purpose,[150] the procedural requirements had been met and the petitioner seeking appointment as administratrix stated a claim of heirship.[151]

In *In re Estate of Ford*[152] the issue was the application of section 91-1-15 of the Mississippi Code[153] and the necessary standard of proof.[154] The case arose following the death of one born illegitimate when kindred of the decedent's natural father made a claim to the estate through their grandfather.[155] The court held that the standard of proof required of claimants on the issues of acknowledgement and support under section 91-1-15(3)(d)(i) was that of the preponderance of the evidence.[156] The court acknowledged that this is a lesser burden than the clear and convincing standard required for proof of paternity cases but that it was consistent with that required in intestate succession cases when illegitimacy was not a factor.[157]

IV. Evidence

In 1989 the Mississippi Supreme Court issued six decisions interpreting evidentiary rules in civil matters. Two of these cases deserve textual treatment; the remaining four construed Rules 401,[158] 503,[159] 606(b),[160] and 703.[161] In *Byrd v. Nix*,[162] the court was presented with

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[150] *Id.* The court noted that paternity could be established by proceeding under the Uniform Law of Paternity, Miss. Code Ann. §§ 93-9-1 to -49 (1972 & Supp. 1989); the adoption statute, Miss. Code Ann. § 93-17-1 (Supp. 1989); the heirship proceedings, Miss. Code Ann. §§ 91-1-27, -29 (1972); and the heirship proceeding available after death of the decedent, Miss. Code Ann. § 91-1-15 (Supp. 1989). *Perkins*, 551 So. 2d at 207-08.

[151] *Perkins*, 551 So. 2d at 208.

[152] 552 So. 2d 1065 (Miss. 1989).

[153] Miss. Code Ann. § 91-1-15.

[154] *Ford*, 552 So. 2d at 1067.

[155] *Id.* at 1066. The kindred of the decedent's natural father were half-blood nieces and nephews of the decedent. *Id.* Other surviving relatives of the decedent were first cousins of the whole blood. *Id.*

[156] *Id.* at 1068.

[157] *Id.* at 1067.

[158] Parker v. Jones County Community Hosp., 549 So. 2d 443, 445 (Miss. 1989) (fact that Jehovah's Witness church defellowshipped decedent because of adulterous affair was irrelevant and inadmissible, but instructions to jury to disregard question precluded mistrial).

[159] Sessums v. McFall, 551 So. 2d 178, 180 (Miss. 1989) (party seeking recovery for physical injury waived doctor-patient privilege only as to issues relating to injury and not as to issues regarding cause of accident).

[160] Schmiz v. Illinois Cent. Gulf R.R., 546 So. 2d 693, 698 (Miss. 1989) (private investigation by jury members of railroad crossing was improper and constituted misconduct necessitating new trial).

an issue of first impression, the admissibility of telephonic evidence.[163] In *Byrd*, which involved a medical malpractice suit,[164] the plaintiff's expert witness had testified at trial by videotape deposition.[165] The defendant presented evidence that contradicted the medical expert's statements,[166] and the plaintiff attempted to offer his witness' rebuttal testimony by speakerphone.[167] The trial court refused to allow this testimony and set forth four primary reasons: (1) the inability of this jury to view the witness' appearance or demeanor during questioning; (2) the inability of the court to positively identify the testifying witness; (3) the court's lack of control over a witness outside the court's jurisdiction; and (4) the inability of opposing counsel to present documents to the witness on cross-examination.[168] The plaintiff argued that Mississippi Rule of Evidence 611(a) authorized the court in its discretion to control the "mode" of interrogating witnesses and that this included interrogation by telephone.[169] However, the Mississippi Supreme Court held that the admissibility of this testimony was within the sound discretion of the trial judge, who did not abuse it in this instance.[170] The supreme court noted, somewhat ominously, that telephonic testimony has not generally been allowed in the absence of exigent circumstances or consent,[171] neither of which existed in the instant case.[172]

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[161] Biloxi Regional Medical Center v. David, 555 So. 2d 53 (Miss. 1989) (expert witness' testimony as to causal connection between injury and prior medical treatment was permissible where expert was aware of underlying facts).

[162] 548 So. 2d 1317 (Miss. 1989).

[163] *Byrd*, 548 So. 2d at 1319.

[164] *Id.* at 1317. The plaintiff, Mr. Byrd, underwent spinal fusion surgery and was not examined by the defendant, his surgeon, until almost a week later when it was discovered that he had suffered, "among other things, a permanent neurogenic bladder, permanent drop foot, a shrunken left leg, and sexual impotence." *Id.* at 1317-18.

[165] *Id.* at 1318. The witness, Dr. Selby, lived in Texas and suffered from a heart ailment which prevented him from traveling. *Id.* Dr. Selby opined that Mr. Byrd's physical impairments were caused by a hematoma, a blood clot, which would have been prevented by a neurological examination after surgery. *Id.*

[166] *Id.* Defendant's witness testified that a hemovac device was inserted in Mr. Byrd after surgery to prevent a hematoma. *Id.*

[167] *Id.* Dr. Selby would have testified that in his opinion the hemovac device would not have prevented the epidural blood clot. *Id.* at 1318-19.

[168] *Id.* at 1318.

[169] *Id.* at 1319.

[170] *Id.* at 1320.

[171] *Id.* at 1319; *see, e.g.*, Aqua Marine Prods., Inc. v. Pathe Computer Control Sys. Corp., 229 N.J. Super. 264, 551 A.2d 195, 200 (1988) (testimony by telephone not allowed in absence of special circumstances); Ferrante v. Ferrante, 127 Misc. 2d 352, 485 N.Y.S.2d 960, 962 (Sup. Ct. 1985) (telephonic testimony of 92-year-old plaintiff allowed).

[172] *Byrd*, 548 So. 2d at 1318.

In *Motorola Communications v. Wilkerson*,[173] a wrongful death action,[174] the supreme court upheld the admissibility of the deceased plaintiff's hearsay statements under Mississippi Rules of Evidence 803(24) and 804(b)(5), otherwise known as the residual hearsay exceptions.[175] In *Wilkerson*, the decedent was hit by a car driven by the defendant,[176] and two months later died of a heart attack as a direct result of injuries received in the collision.[177] Prior to his death, however, the decedent was interviewed by an investigator for the defendant's insurance carrier; the plaintiff introduced a record of this interview into evidence over the defendant's objections.[178] The court concluded that this rarely-used exception was properly applied in the instant case because the recorded interview complied with a five-part test composed by the supreme court in a prior decision, under which admission of the statement was shown to be in the interests of justice.[179]

V. Miscellaneous

During 1989 the Mississippi Supreme Court decided three cases in which challenges were made to actions taken by public entities. The first was a February decision, *Harrison County School Board v. Morre-*

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[173] 555 So. 2d 713 (Miss. 1989).

[174] *Wilkerson*, 555 So. 2d at 614. This action was initiated by Mary Wilkerson, the only child of the decedent, William Tyler. *Id.*

[175] *Id.* at 719-20.

[176] *Id.* at 714. Plaintiff sued the driver, Luther Jasper, and his employer, Motorola Communications. *Id.* Mr. Jasper was driving home from work when his car sideswiped Mr. Tyler, an 85-year-old man, who was walking across the intersection. *Id.* at 714-16.

[177] *Id.* at 716. Mr. Tyler suffered head injuries and later developed blood clots in his brain. *Id.*

[178] *Id.* at 719. The trial court noted that this was the only record of decedent's version of what happened, the only other evidence being defendant's own testimony, that plaintiff had sent notice of intent to use the statement, and finally that the statement was made to defendant, an adverse party, thereby guaranteeing its trustworthiness. *Id.*

[179] *Id.* at 720. The supreme court first announced this test in Cummins v. Mississippi, 515 So. 2d 869, 873 (Miss. 1989), which provides, in pertinent part, as follows:

> (1) The proponent of the evidence must give the adverse party the notice specified within the rule.
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> (2) The statement must have circumstantial guarantees of trustworthiness equivalent to the 23 specified exceptions listed in Rule 803.
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> (3) The statement must be offered as evidence of a material fact.
>
> (4) The statement must be more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts.
>
> (5) The general purposes of the Federal Rules and the interests of justice must best be served by admission of the statement into evidence.

Id., *quoted in Wilkerson*, 555 So. 2d at 713.

ale.[180] In *Morreale*, a teacher's aide was suspended from her job without being granted a pre-termination hearing but was given a post-termination hearing before the School Board at which she was allowed counsel and presentment of witnesses and evidence.[181] Upon review the chancery court reversed the School Board's decision, citing a violation of due process arising from the Board's denial of recusal.[182] The Mississippi Supreme Court reversed, holding that Morreale had neither a statutory right to a hearing nor sufficient property interest in the job to entitle her to procedural due process.[183]

In June, the court handed down *Hinds County Board of Supervisors v. Common Cause*,[184] in which the court stated that the Open Meetings Act[185] was enacted for the benefit of the public and a consent decree ordered to ensure enforcement thereof is presumed valid and must be carried out technically as well as in a manner which promotes the philosophy and spirit of the Act.[186] Finally, in August, the court dealt with *Jones v. City of Meridian*,[187] where an attorney convicted thereunder challenged Mississippi's "breach of the peace" statute[188] as

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[180] 538 So. 2d 1196 (Miss. 1989).

[181] *Morreale*, 538 So. 2d at 1198-99.

[182] *Id.* at 1199. Morreale's attorney had requested that the hearing be closed, that Board members recuse themselves and that a hearing officer be appointed. *Id.* The requests were denied and an open hearing was held before the Board on March 2, 1986. *Id.*

[183] *Id.* at 1203. The Court cited MISS. CODE ANN. § 37-9-59 (Supp. 1985), as it was then effective, which gave a teacher the right to a pre-termination public hearing. *Morreale*, 538 So. 2d at 1200 (Section 37-9-59 has since been amended effective July 1, 1987, and uses the term "certified employee" in place of "teacher." MISS. CODE ANN. § 37-9-59 (Supp. 1989)). The court noted that Morreale did not fit the statutory definition of teacher. *Morreale*, 538 So. 2d at 1200. The court rejected the finding that the Board's position as both accuser and judge violated due process rights and held that a mere showing of involvement was insufficient to overcome the presumption of honesty and integrity of policy makers with decision making power. *Id.* at 1201 (citing Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 496-97 (1976)).

[184] 551 So. 2d 107 (Miss. 1989).

[185] MISS. CODE ANN. §§ 25-41-1 to -17 (1972).

[186] *Hinds County*, 551 So. 2d at 118, 123, 125. The Board of Supervisors was under a chancery court injunction to comply with the Open Meetings Act, and the record revealed over fifty violations. *Id.* at 109.

[187] 552 So. 2d 820 (Miss. 1989).

[188] MISS. CODE ANN. § 97-35-13 (1972).

unconstitutionally overbroad and vague.[189] The statute was upheld under both challenges.[190]

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[189] *Jones*, 552 So. 2d at 821.

[190] *Id.* at 824-25. The court noted that while the statute might arguably be construed so as to reach constitutionally protected speech or conduct, the trial court's limiting jury instruction precluded such application. *Id.* at 825. In addressing the allegation of vagueness, the court followed the rule set out in Connally v. General Constr. Co., 269 U.S. 385, 391 (1926), which stated that a statute should be held void if the prohibited conduct is so undefined that individuals "of common intelligence must necessarily guess at the meaning and differ as to its application." *Jones*, 552 So. 2d at 824 (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)) (emphasis omitted).

PROPERTY

Several decisions rendered in 1989 by the Mississippi Supreme Court will have significant impact on property law in our state and will, therefore, be treated textually in some detail. Cases not selected for textual commentary involved zoning ordinances,[1] abandoned property,[2] condemnation,[3] fraudulent conveyances,[4] partition,[5] reversionary clauses,[6] leases,[7] additur,[8] pleadings,[9] trespass,[10] easement,[11] restrictive

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[1] Great South Fair v. City of Petal, 548 So. 2d 1289, 1293 (Miss. 1989) (ordinance which limited operation of fairs to one consecutive day was unauthorized use of police power by city and thus violated the first amendment); Barrett v. Hinds County, 545 So. 2d 734, 738 (Miss. 1989) (doctrine of relation back will apply to allow claim of exemption to ordinance based on preexisting, non-conforming use of property where property was purchased at tax sale prior to enactment of ordinance but tax deed not delivered until after two-year redemption period and after enactment of ordinance).

[2] Cole v. National Life & Accident Ins. Co., 549 So. 2d 1301, 1308-09 (Miss. 1989) (where Mississippi statute of limitations has run against owners of unclaimed funds held by insurance companies prior to effective date of the Uniform Disposition of Unclaimed Property Act, MISS. CODE ANN. § 89-12-1 to -57 (Supp. 1989), state's derivative claim to such funds is also time-barred).

[3] City of Gulfport v. Anderson, 554 So. 2d 873, 876 (Miss. 1989) (landowners' imprudence in purchasing property or failing to improve it are factors jury must consider in assessing property value and losses thereto attributable to condemnation action).

[4] Southeast Bank v. Sarullo Enters., 555 So. 2d 704, 729 (Miss. 1989) (where conveyance of property by husband to wife is set aside as fraudulent, reimbursement to wife of payments made in connection with property is improper); McDonald v. Myrick, 543 So. 2d 188, 189 (Miss. 1989) (where one participates in fraudulent conveyance in effort to conceal property from creditors, he will be deprived of any insurance proceeds received from destruction of property so conveyed).

[5] O'Neill v. O'Neill, 551 So. 2d 228, 233 (Miss. 1989) (where court-ordered partition directs purchaser to pay cash, agreement by purchaser to make cash payment and assume outstanding mortgage is not in compliance with court order and sale will be set aside).

[6] Garraway v. Yonce, 549 So. 2d 1341, 1343 (Miss. 1989) (conveyance to school by deed containing no conditions of use or reversionary clauses will not be interpreted to imply reversion for non-school uses where intent to convey property without conditions is clear); Pearson v. City of Louisville, 539 So. 2d 1046, 1049 (Miss. 1989) (reverter clause providing that land not be abandoned or used for non-railroad purposes or property shall revert to city will not be triggered by conveyance of property alone, where purchaser granted easement to railroad and is not presently using property for non-railroad purposes).

[7] Gray v. Edgewater Landing, Inc., 541 So. 2d 1044, 1047 (Miss. 1989) (shareholders of close corporation will not be held personally liable for damage to property leased to corporation absent proof that lessor looked to individuals rather than corporation for performance, corporation flagrantly disregarded corporate formalities, or shareholders

covenants,[12] foreclosure,[13] and property taxation.[14]

I. Sixteenth Section School Lands Leases

In *Hill v. Thompson*,[15] the Mississippi Supreme Court held that where lease consideration for section sixteen school lands[16] is grossly

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were guilty of fraud).

[8] State Highway Comm'n of Mississippi v. Hayes, 541 So. 2d 1023, 1025-26 (Miss. 1989) (where substantial evidence exists to support jury award, trial judge may not grant additur based on his personal opinion of property value).

[9] Carpenter v. Haggard, 538 So. 2d 776, 777 (Miss. 1989) (complaint to partition land that fails to deraign title and fix exact interests of parties is sufficient to survive Rule 12(b)(6) motion to dismiss so long as some interest in land is alleged therein).

[10] Berry v. Player, 542 So. 2d 895, 898-99 (Miss. 1989) (standard of care necessary for person to claim good faith defense to trespass and cutting of timber is "whatever precaution and safeguards as are reasonably necessary to assure himself that he has the lawful authority to do so"; failure to take such steps negates good faith and statutory damages may be assessed as well as actual damages).

[11] Suman Corp. v. Warren, 553 So. 2d 1123, 1126 (Miss. 1989) (where private road is conveyed subject to rights of abutting landowners to use such road and where public use of road has been continuous for statutory period, record owner of road may not enjoin abutting landowners for alleged damage to road and loss of quiet enjoyment); Taylor v. Hays, 551 So. 2d 906, 908 (Miss. 1989) (easement by necessity terminates when other access to land-locked property becomes available).

[12] White Cypress Lakes Dev. Corp. v. Hertz, 541 So. 2d 1031, 1032 (Miss. 1989) (homeowners of property in subdivisions restricted by covenant to use for single family homes have right to enforce covenants outside particular subdivisions where they own property when those subdivisions were developed as part of common scheme and homeowners were induced to purchase based on such scheme).

[13] Kaiser Investments, Inc. v. Davis, 538 So. 2d 427, 430 (Miss. 1989) (10 percent trustee's fee provided in deed of trust applied only where foreclosure sale had been completed; otherwise fee should be "reasonable" under totality of circumstances). The following cases dealing with foreclosures were also decided by the court; however, as of this writing, they have not been released for publication and are subject to withdrawal: Wansley v. First Nat'l Bank of Vicksburg, No. 58,207, slip op. at 7 (Miss. April 5, 1989) (failure of bank to appoint disinterested trustee renders foreclosure sales voidable; holding to take effect 90 days after opinion published); Federal Land Bank of Jackson v. Wolfe, No. 07-58,638, slip op. at 9 (Miss. Dec. 6, 1989) (failure to admit evidence of Bank's (mortgagee) efforts to sell property after foreclosure and evidence of declining land values is reversible error in trial for deficiency judgment).

[14] Rebelwood, Ltd. v. Hinds County, 544 So. 2d 1356, 1358 (Miss. 1989) (public assessor, in determining true value of property for purposes of advalorem taxation, may consider enhancements to value from benefits received by federal subsidies).

[15] No. 07-58,509, slip op. (Miss. Oct. 11, 1989).

[16] In 1817, when Mississippi was admitted as a state, Congress provided that territorial lands were to be "surveyed and divided in the manner provided by law for the surveying of the other public lands of the United States" and further required that "the section No. 16 in each township . . . shall be reserved for the support of schools therein."

inadequate relative to the land's fair market rental value, the lease is voidable because it violates article IV, section 95, of the Mississippi Constitution,[17] which prohibits the donation of public lands to private individuals.[18] This suit arose when William C. Thompson filed a complaint in the Chancery Court of Scott County for confirmation of his title to a leasehold interest of section sixteen school trust land.[19] Named as defendants in the suit were the State of Mississippi, whose agent for process was the superintendent and the members of the Board of Trustees of the Forest Municipal Separate School District, the president and members of the Board of Supervisors of Scott County, and the Scott County Board of Education, all in their official capacities.[20]

Defendants denied that Thompson had good title, alleging that the consideration of $7.50 for the leasehold interest he purchased, issued for a ninety-nine year term, was so grossly inadequate as to constitute a gift as prohibited by the Mississippi Constitution.[21] Defendant's counterclaim sought voiding of the lease and confirmation of title in the State of Mississippi in trust for the public schools.[22] The chancery court confirmed title in Thompson for a ninety-nine year term to terminate at midnight on July 4, 2059.[23] Further, the chancery court assessed sanctions[24] against the defendants on grounds that they had

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Land Sales Act, 3 STAT. 375 (1817). The Mississippi legislature has stated that these lands "constitute property held in trust for the benefit of the public schools and must be treated as such." MISS. CODE ANN. § 29-3-1(1) (Supp. 1985).

[17] The Mississippi Constitution provides that "Lands belonging to, or under the control of the state, shall never be donated directly or indirectly, to private corporations or individuals . . . ." MISS. CONST. art. IV, § 95. In addition, the Mississippi Constitution directs the legislature to enact procedures for leasing of these public lands. MISS. CONST. art. VIII, § 211 (1890, amended 1946, 1986).

[18] *Hill*, No. 07-58,509, slip op. at 19-20.

[19] *Id.* at 1-2. The land at issue, Lot 6, was first leased in 1859 by the Board of Police of Scott County as part of a 240-acre tract leased for a ninety-nine year term at a consideration of $88.00. *Id.* at 3. In 1943 the unexpired 1859 leasehold interest in Lot 6 was confirmed by the Chancery Court of Scott County in Standard Oil Company, which later conveyed its remaining four years' interest to H.L. Lackey in 1955. *Id.* Lackey, who operated a service station on the lot, obtained a new lease on the lot that same year for a ninety-nine year term at a consideration of $7.50. *Id.* After Lackey's death, his heirs conveyed the leasehold interest to Kenneth Haden, the purchase price of which was secured by a deed of trust. *Id.* Haden apparently defaulted, and Thompson then purchased the lot in 1985 for a consideration of $7,000. *Id.*

[20] *Id.* at 1-2.

[21] *Id.* at 4.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 2. Sanctions included $7,500 for attorney's fees and court costs. *Id.*

filed a frivolous defense and counterclaim.[25] From this judgement, the board and Richard C. Hill, its superintendent, appealed and presented twelve assignments of error, not all of which were addressed by the court.[26]

The Mississippi Supreme Court examined the historical background and purpose of section sixteen school trust lands[27] and the duties of the Board as trust supervisors[28] and reversed the chancellor's decisions as to the lease validity and assessment of attorney's fees against the Board.[29] The chancery court had found that, given the state of the economy in Forest, Mississippi, after World War II, the consideration given by the original leaseholder for the lease in 1955 was adequate under the applicable statutes[30] and the constitution and therefore confirmed the lease subsequently purchased by Thompson.[31] The Mississippi Supreme Court found that reliance upon existing stat-

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[25] *Id.* The counterclaim was dismissed with prejudice. *Id.*

[26] *Id.* at 2. On this appeal, briefs were filed by then Attorney General, Edwin Lloyd Pittman, on behalf of Dick Molpus, Secretary of State, and by Mississippi Valley Title Insurance Company, as amici curiae. *Id.*

[27] *Id.* at 5. The court quoted extensively from *Papasan v. Allain*, 478 U.S. 265 (1986), a case arising from a Mississippi controversy over alleged inequities in economic benefits received from public school lands in the twenty-three Northern Mississippi counties that were originally held by the Chickasaw Indian Nation and schools in the rest of the state. *Papasan*, 478 U.S. at 270. The Court in *Papasan* found that although the basic grants of public school lands from the federal government to the states were consistent, the specific provisions of the grants had been varied by the different states. *Id.* at 270. The Court found that in Mississippi, section sixteen lands were not directly granted to the townships, but were held in trust by the state for the benefit of the schools within those townships and the management of these trusts was delegated to the local school boards. *Id.* at 271-72.

[28] *Hill*, No. 07-58,509, slip op. at 8-10. *See* Tally v. Board of Supervisors, 323 So. 2d 547, 550 (Miss. 1975) (common law rule that trustee is prohibited from giving away, appropriating to his own use, or otherwise disposing of corpus of trust in derogation of rights of beneficiaries applies to school lands trust); Humble Oil & Ref. Co. v. State, 206 Miss. 847, 41 So. 2d 26, 27 (1949) (such Trustees must exercise higher degree of care than in management of their personal business as well as general run of county's business). *See also* RESTATEMENT (SECOND) OF TRUSTS, § 181 (1959) (trustee has duty to manage trust corpus so that income therefrom is maximized).

[29] *Hill*, No. 07-58,509, slip op. at 5-10, 27.

[30] *Id.* at 10. The statute in operation at the time Lackey purchased the lease provided that leases be issued for a "reasonable amount" to be determined by the board of supervisors, based on recommendations of three disinterested freeholders. *Id.* at 11. An appraisal report commissioned by the Scott County Board of Supervisors in 1947 had fixed a fair market price at $10 per acre on undivided property and $10 per lot on subdivided property and concluded that "there is no justification for other than a nominal value for even long-term leases of sixteenth section lands in this city." *Id.* at 12.

[31] *Id.* at 13.

utory leasing procedures overlooked controlling legal principles concerning property held in trust and constitutional prohibitions on the donation of public lands.[32] The court declined to find such leases void, as contended by the board, but construed former decisions[33] to mean that "the lease for an inadequate consideration is voidable and may be attacked for that reason by a school board. Upon a finding by a court of competent jurisdiction of inadequate consideration, the lease may be declared void."[34] Thompson asserted that he was a bona fide purchaser who should take the property free and clear of any hidden claim or title defect.[35] Thompson further asserted that he paid fair value because the existing structure on the property was worthless and a liability to him.[36] The court found that the consideration of $7.50 for a ninety-nine year term amounted to less than a dime a year in rental and was so inadequate as to "shock the conscience" and "so openly blatant as to put any purchaser on notice of a possible defect in the seller's . . . title."[37] Consequently, the court voided Thompson's lease and remanded the case to the Board of Trustees of the Forest Municipal Separate School District Board for a new determination of the present rental value by a competent appraiser as provided in sections 29-3-1 through -131 of the Mississippi Code.[38] The court added that while

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[32] *Id.* at 13-14. The court noted that section 95 of the Mississippi Constitution had repeatedly been held applicable to school lands trusts. *See, e.g.*, Talley v. Board of Supervisors of Smith County, 323 So. 2d 547, 550 (Miss. 1975) (where consideration is so small as to constitute donation of property, lease is void); Holmes v. Jones, 318 So. 2d 865, 869 (Miss. 1975) (grossly inadequate consideration for section sixteen lands lease violates section 95 of constitution); Koonce v. Board of Supervisors of Grenada County, 202 Miss. 473, 477, 32 So. 2d 264, 265-66 (1947) (same); Keys v. Carter, 318 So. 2d 862, 864 (Miss. 1975) (where fair value of lease was $4,000.00 a year, but was leased for $170.00 annually, such lease amounted to unconstitutional donation and was void).

[33] *See supra* note 31.

[34] *Hill*, No. 07-58509, slip op. at 15.

[35] *Id.* at 16-17.

[36] *Id.* at 17. Thompson had purchased the property to expand his law offices, which were located adjacent to the lot at issue and had spent an additional $13,000 to remove the existing buildings and old gas tanks. *Id.* at 9 (Hawkins, J., dissenting).

[37] *Id.* at 17.

[38] *Id.* at 20. *See, e.g.*, MISS. CODE ANN. § 29-3-63 (Supp. 1989) (minimum annual rental should not be less than five percent of current market value on land classified as industrial or commercial; annual rental on land classified as farm or residential should be fair market value as determined by appraisal); MISS. CODE ANN. § 29-3-65 (Supp. 1989) (appraiser to figure fair market value on currently leased properties one year prior to lease termination and submit figure to board to determine if amount is reasonable; board may include rent escalation or adjustment clauses in leases); MISS. CODE ANN. § 29-3-69 (Supp. 1989) (lease terms limited to forty years, rent adjustment at least once every ten years for industrial and commercial uses).

the appraisal process was being conducted Thompson could use the premises and have right of first refusal of the new lease as well as the right to meet the highest bid when the rental value was determined.[39] The court admitted the severity of the impact of this decision but noted that, given "a century of disregard of this constitutional mandate [of section 95] and of widespread and long continued acceptance of this practice by former officials," custom could no longer be allowed to "overshadow" constitutional directives.[40]

The appellants also raised the issue of whether the 1947 and 1955 appraisals were performed by disinterested freeholders, as prescribed by existing statutes, since the three appraisers were themselves holders of sixteenth section land leases at the time.[41] Thompson objected to the materiality and relevancy of this evidence at trial, and the chancellor sustained this objection.[42] The Mississippi Supreme Court held that such evidence was relevant and should have been admitted and that since the appraisers were not disinterested by virtue of their own sixteenth section leases, such evidence was an additional ground for a voidance of the lease in question.[43]

The Mississippi Supreme Court found that the chancellor erred in holding that the state, acting through its school board, was equitably estopped from asserting inadequate consideration under sections 28-3-7 and 29-3-52 of the Mississippi Code.[44] The court found that the law

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[39] *Hill*, No. 07-58,509, slip op. at 20.

[40] *Id.* at 20.

[41] *Id.* at 22.

[42] *Id.* at 23.

[43] *Id.*

[44] *Id.* at 24. The pertinent parts of those sections are:

> Adverse possession for a period of twenty-five years, under a claim of right or title, shall be prima facie evidence in such case that the law authorizing the disposition of the lands has been complied with and the lease or sale duly made. If the claim is under a lease, the time at which the lease expires shall be fixed by the court.

MISS. CODE ANN. § 29-3-7 (1972).

> Any lease of sixteenth section lands, or lands granted in lieu thereof, executed and recorded in substantial conformity with the provisions of this chapter shall be deemed to be prima facie valid, and defects in ministerial or procedural acts alone shall not affect the validity of any such lease, as far as a bona fide purchaser or encumbrancer for value of any such lease is concerned. Any such purchaser or encumbrancer shall be entitled to rely upon the validity of any such lease insofar as the interest of the state or any political subdivision thereof, the public, or any school district is concerned.
>
> *Nothing in this section shall prohibit any party from challenging the validity of any lease on the grounds of inadequacy of consideration given for the*

was clear, in that the state may not lose property by adverse possession and that no estoppel may be enforced "against the state or its counties where the acts of their officers were unauthorized."[45] The court found that the state was not bound by the actions of the board of supervisors in accepting inadequate consideration for the leases because public officials dealing with property held by the State cannot be treated as private individuals who by negligence fail to ascertain the true value of their own property,[46] nor can the State "abdicate its duty as trustee" for the people.[47] Consequently, the chancellor was reversed on this issue also.[48]

Finally, the Mississippi Supreme Court reversed and rendered as to the trial court's award of attorneys' fees against the board, for, since the lease in question was void, the school board's position was obviously meritorious.[49]

Justice Hawkins dissented, with Justice Sullivan joining.[50] Justice Hawkins argued for affirmance of the chancery decree confirming title in Thompson on the basis of his assertion that section 211 of the Mississippi Constitution is the only provision that deals with leasing sixteenth section lands and that the statutes in operation at the time these leases were executed were in full compliance with that constitutional provision.[51] Justice Hawkins further asserted that at the time this lease was executed $7.50 was adequate consideration in light of the economic conditions of the area and that "30 years after the fact . . . there is no possible way the majority can know the conditions, reasons or circumstances under which these leases were executed."[52] Justice Hawkins added that making sixteenth section lands productive by inducing people to live and build on this property was a benefit to the school system that the majority ignored.[53] In conclusion, he warned that the uncertainty this decision would create in leaseholders of six-

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lands involved in the lease.

MISS. CODE ANN. § 29-3-52 (Supp. 1989) (emphasis added).

[45] *Hill*, No. 07-58,509, slip op. at 24-25. *See* Oktitbbeha County Bd. of Education v. Town of Sturgis, 531 So. 2d 585, 589 (Miss. 1988) (concerning unauthorized acts by county officials and invalid sixteenth section lands lease).

[46] *Hill*, No. 07-58,508, slip op. at 25. (citing State *ex rel* Kyle v. Dear, 209 Miss. 268, 279, 46 So. 2d 100, 104 (1950)).

[47] *Id.* (citing Pace v. State *ex rel* Rice, 191 Miss. 780, 4 So. 2d 270 (1940).

[48] *Id.* at 26.

[49] *Id.* at 27.

[50] *Id.* at 1 (Hawkins, J., dissenting).

[51] *Id. See supra* note 17 for constitutional provisions at issue.

[52] *Id.* at 2.

[53] *Id.* at 4.

teenth section lands would result in drastically reduced investment and improvement on these lands adversely affecting revenue prospects for many small towns in Mississippi that "continue in a desperate struggle to keep afloat."[54]

II. Rule Against Perpetuities

In *Davis v. Deposit Guaranty National Bank*,[55] the Mississippi Supreme Court affirmed the declaratory judgment rendered by the Chancery Court of Amite County that held a bequest in trust to provide for the education of the descendants of a named beneficiary for twenty-five years from the date of probate did not violate the Rule Against Perpetuities.[56] At issue was the will of Charles M. Anderson,[57] who by said instrument made substantial bequests to his nephew, appellant Howard W. Davis,[58] with the remainder of his estate to be held in trust for the education of other nephews and nieces for the next twenty-five years, at the end of which the trust corpus would revert to Davis.[59]

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[54] *Id.* at 31.

[55] 541 So. 2d 423 (Miss. 1989).

[56] *Davis*, 541 So. 2d at 424.

[57] *Id.* Anderson was a bachelor whose parents, brother, and sister had predeceased him. *Id.* Anderson died on December 12, 1984, and his will was admitted to probate on December 21, 1984. *Id.* at 426.

[58] *Id.* at 424. Davis was the son of the testator's deceased sister. *Id.*

[59] *Id.* at 425. That portion of the will at issue reads as follows:

> I hereby direct that the Deposit Guaranty National Bank of Jackson, Mississippi, take into its absolute control and handle as trustee the following described property, to-wit:
>
> [Then follows the description of approximately 960 acres of land.]
>
> The trustee shall use all of the income derived from the above described property, be it timber, minerals or other such income which may develop in the future, *for the education of the descendants of F.A. Anderson, Sr. for a period of twenty-five (25) years from the date of the admission of this last will and testament for probate.* The trustee shall not be authorized to sell and dispose of the real property but only use the income therefrom and it shall do so without any limitation whatsoever. *Also to be used in the same manner for the same purpose, that being the education of the descendants of F.A. Anderson, Sr., for a period of twenty-five (25) years from the date of the admission of this last will and testament for probate shall be all of the income developed from my interests in oil, gas and mineral rights . . . . At the conclusion of the twenty-five year period for which this trust is created, then I give, devise and bequeath the real property and all of the oil, gas and minerals, which may then be in, on or under the property to Howard W. Davis and any money or securities which may still be in the educational funds at the end of the twenty-five years should likewise be delivered to Howard W. Davis, and in the*

The descendants of F.A. Anderson, Sr., the testator's deceased father, included five grandchildren, ten great-grandchildren at the time of the testator's death and two more great-children born since his death.[60] Deposit Guaranty National Bank (Bank), as executor of the will and one of the appellees in the instant case, petitioned the chancery court for probate of the will in solemn form on February 5, 1986.[61] On March 14, 1986, the Bank filed a petition for construction of the will, specifically Item IX of the will.[62] Davis filed a response arguing that the bequest in Item IX violated the Rule Against Perpetuities because by its terms it would last for twenty-five years and the time of commencement was indefinite.[63] Davis also argued that the terms of the trust were vague and the beneficiary class was uncertain.[64] Davis later amended his pleadings to argue in the alternative that if the trust was not held void it should be attentuated to conform to the Rule Against Perpetuities—that is, twenty-one years.[65]

The chancery court found that the educational trust was valid; that the trust term commenced at testator's death and would continue for a period of twenty-five years or twenty-one years from and after the death of Davis, whichever first occurred; that the trust would be unenforceable only to the extent that the term exceeded the lifetime of Davis, plus twenty-one years; and that, for those reasons, the trust did not violate the Rule Against Perpetuities.[66] The court further declared Davis' interest to be a non-possessory vested remainder interest in trust property, subject to complete defeasance in favor of the heirs of his body in the event he should die prior to termination of the trust term.[67] The court found the beneficiary class well-defined and the provisions of the trust clear and unambiguous.[68] On appeal, Davis asserted as error that the educational trust created an executory interest and that such interests were contingent and might fail to vest within the period prescribed by the Rule Against Perpetuities and thus were void.[69] Davis further asserted that the alternate interest created in the

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event of his death prior to his taking, then to the heirs of his body.
Id. at 424-25 (emphasis added).

[60] *Id.* at 425-26.

[61] *Id.* at 426.

[62] *Id.*; *see supra* note 58.

[63] *Id.* at 426.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.* at 427.

[68] *Id.*

[69] *Id.*

heirs of Davis' body upon termination of the trust also violated the Rule.[70]

The Mississippi Supreme Court stated that the purpose of the Rule Against Perpetuities has been to limit testamentary intent where it would result in "dead hand" control over property, thus preventing the present generation from using the property as it saw fit and rendering the property unmarketable and unproductive.[71] The court voted that, "[s]een in its best light, the Rule represents a balancing of the interests of the present owner in controlling his property well into the future against the future owner's interests in unrestricted use and alienability."[72] However, the court added that the Rule represents the "historical tendency of property law to forget the original reason for its rule and to reduce principles to logic."[73] Justice Robertson expounded, "On the other hand, we regard the treatment of the Rule as a theorem, as a rule of logical proof, if you will, and the untoward, if not absurd, results so generated, as a major force fueling the flames of common sense and fidelity to principle and purpose which have marked this state's experience in recent times."[74] Tracing the historical origins of the Rule,[75] the court adopted as the best phrasing of the Rule: "No interest is good unless it vests within twenty-one years after the death of all persons in being when the interest is created who can affect the vesting of the interest."[76] The court noted that the traditional statement of the Rule had been modified by this state in three major ways: (1) the adoption of the wait-and-see doctrine;[77] (2) the abolition of the all-or-nothing rule for class gifts;[78] and (3) the implication of a savings clause into any devise which would otherwise violate the Rule, to be-

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[70] *Id.*

[71] *Id.* at 428. An additional effect of "dead hand" control mentioned by the court was the creation of "trusts which can protect wealthy beneficiaries from creditors, decrease the amount of risk capital available for economic development and, after a period of time and change in circumstances, tie up the family in disadvantageous and undesirable arrangements." *Id.*

[72] *Id.*

[73] *Id.* (quoting Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867, 1870 (1986)).

[74] *Id.* at 428.

[75] *See* Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. OF PA. L. REV. 19, 19-46 (1977).

[76] *Davis*, 541 So. 2d at 429; *see* Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1713 (1985).

[77] C & D Invest. Co. v. Gulf Transp. Co., 526 So. 2d 526, 530 (Miss. 1988); Phelps v. Shropshire, 254 Miss. 777, 785, 183 So. 2d 158, 162 (1966).

[78] Carter v. Berry, 243 Miss. 321, 140 So. 2d 843, 851 (1962).

come operative only when it becomes apparent that remote vesting would occur.[79] Applying the Rule, as modified, to the facts of the case, the court found that the measuring lives were not limited to persons named in the will, that is Davis, but would be all persons who were descendants of F.A. Anderson, Sr., and who were alive on December 12, 1984.[80] The court noted that it would be possible for all of these descendants to die more than twenty-one years before the termination of the trust or that no descendant would qualify for the educational benefits before the termination of the trust.[81] As Davis asserted, application of the Rule would render such interests void and the entire estate should go to Davis, but the court concluded, such a result was not the testator's intent, and by application of the wait-and-see doctrine that intent would be preserved.[82] The court found that several beneficiaries of the trust at issue had already qualified for and received the educational benefits so provided, thus ameliorating the problems cited by objectors to the wait-and-see doctrine that might result from not knowing whether an interest was valid or void possibly for several decades.[83] The court acknowledged Davis' assertion that upholding the trust in this case would make a "shambles" of the Rule but noted that "the Rule itself, at least without the Mississippi modifiers, is a shambles."[84] Judicial application of the modifying doctrines—wait-and-see, the implied savings clause and the abolition of all-or-nothing in class gifts—should foreclose any need for legislation on the subject, the court stated.[85]

As to the issue of whether the interests created in the heirs of Howard Davis also violated the rule, the court again applied the wait-and-see doctrine and denied this assignment of error.[86] The court found Davis' contention that the terms of the trust were ambiguous and vague to be addressed adequately by a substantial body of case law and thus without merit.[87]

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[79] *Davis*, 541 So. 2d at 429-30.

[80] *Id.* at 430-31.

[81] *Id.* at 431.

[82] *Id.* at 432. Under the wait-and-see doctrine, the validity of an interest is judged by whether the interest in fact vests or fails within the perpetuities period. C & D Inv. Co. v. Gulf Transp. Co., 526 So. 2d 526, 530 (Miss. 1988).

[83] *Davis*, 541 So. 2d at 432-33.

[84] *Id.* at 433.

[85] *Id.* at 433 n.23; *e.g.*, Uniform Statutory Rule Against Perpetuities, promulgated in 1986 by the National Conference of Commissioners on Uniform State Laws.

[86] *Davis*, 541 So. 2d at 434.

[87] *Id.* at 434-36.

III. ANNEXATION—STANDARD OF REVIEW OF CHANCELLOR'S DETERMINATION OF "REASONABLE"

Several decisions concerning annexations were rendered during the 1989 term, with the central issue being what standard of review the court should apply to a chancellor's finding that an annexation was reasonable under the totality of circumstances.

In *Bassett v. Town of Taylorsville*,[88] the Mississippi Supreme Court was in agreement that where the chancellor's findings that a proposed plan of annexation was reasonable under the totality of the circumstances and was supported by substantial credible evidence, such findings would not be reversed on appeal.[89] In *Bassett*, the Mayor and Board of Alderman of the Town of Taylorsville adopted an ordinance declaring that the public convenience and necessity required expansion of the town limits to include an area of approximately 1.45 square miles lying to the north and west of the town limits.[90] Challenging the proposed plan were two businessmen[91] and four owners of undeveloped farm lands[92] located within the area designated for annexation.[93] The Chancery Court of Smith County found the annexation plan reasonable in its entirety after hearing the testimony of several experts offered by the town.[94] Appellants argued that the chancellor's determination that annexation was reasonable was unsupported by the evidence and

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[88] 542 So. 2d 918 (Miss. 1989).

[89] *Bassett*, 542 So. 2d at 923.

[90] *Id.* at 919-20.

[91] *Id.* at 919. William D. Bassett was sole stockholder of Automatic Plating, Inc., a metal coating operation that employed 18 to 20 persons; Enamel Products and Plating Company operated Solar Hardware Company, employing nearly 275 people. *Id.* at 922. Both businesses had operations in the Industrial Park area located just outside the pre-annexation town limits. *Id.*

[92] *Id.* at 919-20. J.C. Ainsworth, Sr., and Daisy J. Ainsworth owned a large amount of property north of Taylorsville, of which only a small portion would be included in the proposed annexation. V.R. King and J. J. King owned property to the west of the Ainsworths' land. *Id.* at 919-20, 922.

[93] *Id.* at 919-20.

[94] *Id.* at 921. The Town called Clyde Cook, an expert in land use and urban planning who had studied Taylorsville in some depth several years earlier, for a prior annexation proposal. *Id.* at 920. Cook testified that he examined the population growth of Taylorsville relative to the remaining developable land to determine that the path of growth was to the north and west of the town limits and that the town had the financial ability to provide services for the annexed area. *Id.* Also called as expert witnesses were an environmental consultant, an engineer, a state fire department evaluator, the town CPA, and the town clerk. *Id.* at 922. The town clerk testified that with the annexation, revenue would increase by approximately $28,000 annually. *Id.* at 920.

was, therefore, patently unreasonable.[95]

The Mississippi Supreme Court found the evidence on record to be substantial and affirmed the chancellor's findings.[96] The court stated that there were two legal predicates to an annexation: (1) that the annexation be "required by the public convenience and necessity";[97] and (2) that a determination of reasonableness must be made by the governing board and the court by balancing the interests of both landowners and the municipality seeking annexation.[98] The court pointed to twelve judicially recognized indicia of reasonableness developed over the years: (1) the municipality's need for expansion; (2) whether the area to be annexed was within the city's path of growth; (3) potential health problems of sewage or waste in the proposed area; (4) the city's financial ability to provide services in the proposed area; (5) the need for zoning or planning in the area; (6) the need for services in the area; (7) what natural barriers exist between the city and the area to be annexed;[99] (8) the city's past performance in meeting needs of its present residents; (9) the impact of annexation on residents and landowners in the proposed area of annexation; (10) the impact of voting strength of protected minority groups in the area; (11) the degree to which residents and landowners in the area to be annexed had received economic and social benefits from the city in the past, or would do so in the future without contributing to the tax revenue;[100] and (12) any other factors affecting reasonableness.[101] Consideration of these factors, the court concluded, should help the chancellor in determining whether under the totality of the circumstances the annexation was

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[95] *Id.* at 920-21. Appellants also argued that the proposed plan would dilute black voting strength, but the court dismissed this argument in a footnote, finding that no black persons had appeared or complained and none lived in the area to be annexed. *Id.* at 920 n.3.

[96] *Id.* at 923.

[97] MISS. CODE ANN. § 21-1-33 (1972).

[98] *Bassett*, 542 So. 2d at 921; *see* City of Greenville v. Farmer's, Inc., 513 So. 2d 932, 941 (Miss. 1987) (reasonableness is judicial question); Western Line Consol. School Dist. v. City of Greenville, 465 So. 2d 1057, 1061 (Miss. 1985) (same).

[99] *Bassett*, 542 So. 2d at 921. The court found this factor determinative in dismissing the argument asserted by appellants Ainsworth and King, in that their farm lands formed a natural corridor between the residential area in the northeast part of the annexation and the industrial area to the west, so that the town's proposal to include that portion of their lands was reasonably necessary for compactness of the overall area. *Id.* at 923.

[100] *Id.* at 921. The court noted that appellants Bassett and Enamel Products received substantial benefits by virtue of their close proximity to Taylorsville, deriving both their employees and business revenue from the Town. *Id.* at 922.

[101] *Id.* at 921-22.

reasonable.[102] Absent a showing of manifest error or lack of substantial, credible evidence to support the chancellor's determination, the court admitted its scope of review was limited and therefore affirmed.[103]

However, in *City of Jackson v. City of Ridgeland*,[104] the Mississippi Supreme Court, sitting *en banc*, reversed a chancery court decision that found the proposed annexation of 4.92 square miles along Jackson's north border to be unreasonable in its entirety.[105] Although the court acknowledged its limited scope of review of such issues, the court added, "We may reverse as well where the Chancery Court has employed erroneous legal standards or where we are left with a firm and definite conviction that a mistake has been made."[106] The chancery court's fundamental error was, the court stated, in treating the factors determinative of reasonableness as separate standards, and not elements of a single standard.[107] Of even more importance, the court added, was the fact that the lower court treated these factors as exclusive, failing to consider "what denial of the annexation might do to the long range future of Mississippi's capitol [sic] city."[108]

At issue was Jackson's proposed expansion of its northern boundary, in particular the easternmost 4.3 miles not "locked in" by the City of Ridgeland's southern borders.[109] Jackson's ability to expand its borders was already severely limited, in the court's view, by the communities of Flowood, Pearl, and Richland to the east and southeast; the western boundary of Rankin County to the east;[110] the City of Clinton to the west; and the Pearl River and Rankin County lines to the south.[111] To deny annexation in this instance and possibly allow future appropriation of the area by Ridgeland would further diminish any possible expansion of Jackson's tax base, the court stated.[112] Jackson's need for expansion in light of "a gradual recession of [its] (economic) life blood to the various surrounding communities" was a significant factor, the court felt, in compelling a finding of reasonableness by the

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[102] *Id.* at 922.

[103] *Id.* at 921.

[104] 551 So. 2d 861 (Miss. 1989)

[105] *City of Jackson*, 551 So. 2d at 862.

[106] *Id.* at 863-64.

[107] *Id.* at 864-65.

[108] *Id.* at 865.

[109] *Id.* at 862.

[110] *Id.* The Rankin County barrier was fixed by statute. MISS. CODE ANN. § 61-9-5 (1972).

[111] *City of Jackson*, 551 So. 2d at 862.

[112] *Id.* at 865.

court below.[113] "Indeed, the very statistics recited by the Court below [to conclude that Jackson had a minimal need for new lands] are the product of the flight of so many persons from Jackson's corporate limits, not so far as to deprive themselves of full access to the economic, social and cultural benefits Jackson has to offer but only so far as to sever their relationship with Jackson's assessor and tax collector."[114] The court then applied each of the factors determinative of a finding of reasonableness to the facts at hand to conclude that Jackson's annexation proposal was reasonable.[115]

In his dissent, Justice Blass argued that persons electing to live in communities outside the city should not be "absorbed" simply to increase city tax revenue "in the absence of some compelling requirement for the common good of the overall community."[116] The majority opinion, Justice Blass admonished, was based not on a finding of manifest error by the chancellor, but was instead "a value judgment, skillfully buttressed by excellent legal prose."[117]

On petition for rehearing, denied by a majority of the court, sitting *en banc*, Justice Blass again dissented,[118] arguing that reversal of a chancellor's finding as to the reasonableness, or unreasonableness, of an annexation plan should be based on a showing of manifest error which should not be "defined as simply making a decision with which a majority of this Court does not agree."[119]

Justice Hawkins also dissented to the denial of petition for rehearing, stating that he could make no improvement upon the chancellor's findings and opinion and that the opinion would therefore be made an appendix to his dissent.[120]

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[113] *Id.*

[114] *Id.*

[115] *Id.* at 865-68. In general, the court concluded that the area to be annexed was within Jackson's path of growth (actually the only path left for growth); the city was capable of providing services to the area despite its past failure to provide services in a prior 1976 annexation (due to special problems in the area); and benefits received to homeowners from annexation outweighed any negative impact such as increased taxes, thus rendering annexation "fair." *Id.* The court noted that what "tips this case over the line into the 'reverse' column is the overwhelming presence of other indicia of reasonableness, indicia not heretofore specifically recognized in our prior decision—and wholly ignored below . . . that Jackson's becoming substantially landlocked by surrounding incorporated communities." *Id.* at 868.

[116] *Id.* at 869-70 (Blass, J., dissenting).

[117] *Id.*at 870.

[118] *Id.* at 877.

[119] *Id.* at 879.

[120] *Id.* at 870.

Finally, in *Prentiss County Annexation Committee v. City of Booneville*,[121] the Mississippi Supreme Court affirmed the decision of the Chancery Court of Prentiss County wherein the chancellor concluded that an ordinance adopted by the City of Booneville to annex eighteen square miles surrounding its city limits was reasonable.[122]

On March 16, 1987, when the city filed its petition seeking to have the ordinance ratified and confirmed, it named as defendant the City of Jumpertown because Jumpertown was the only town located within three miles of the proposed annexation.[123] Jumpertown answered and raised no objection to the proposal conditioned on the court's ratification of a service agreement between Booneville and Jumpertown concerning water service to persons living in the annexed area.[124] Objectors to the annexation plan also answered the petition, contending that annexation would not be reasonable since the proposed area was not within the city's path of growth and because flood hazards existing in the area constituted natural barriers that would thwart growth within the annexed area.[125] Also answering the city's petition and objecting to annexation was the Prentiss County School Board, which asserted that annexation would have a devastating effect on the county schools by automatically merging the dwindling population of the county schools with schools in the municipal district.[126]

The Mississippi Supreme Court found that there was substantial, credible evidence on the record to support the chancellor's decision as to the reasonableness of the overall plan and the court therefore af-

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[121] 551 So. 2d 890 (Miss. 1989).

[122] *City of Booneville*, 551 So. 2d at 890.

[123] *Id.* at 891.

[124] *Id.*

[125] *Id.* The chancellor found that evidence presented at trial, namely a study conducted by the Mississippi Research and Development Center, as well as testimony from several of the city's witnesses, did not support these contentions; and the supreme court found such evidence supportive of the chancellor's findings. *Id.* at 893.

[126] *Id.* at 891-92. Despite assurances by the chancellor that the present state of the law would allow the school systems to operate separately, the board argued on appeal that the repeal of MISS. CODE ANN. § 37-7-611, *repealed by* 1986 Miss. Laws, ch. 492, § 47, effective in 1987, upon which the chancellor based his assurances, had not been precleared by the federal government pursuant to the Voting Rights Act of 1965, 42 U.S.C. 1973 (1982). *Id.* at 894. The Board asserted that the repeal would not likely survive federal government scrutiny and was not effective until July 1, 1987, so that the chancellor erred in finding that annexation would not affect the status of the Prentiss County Schools based on the new law. *Id.* at 895. The court dismissed this argument as "an exclusively federal question" and concluded that the chancellor was correct in making his determination based on the 1987 repeal. *Id.*

firmed the chancery court's findings.[127]

In his dissent, Justice Blass argued that allowing a "dying" city such as Booneville to increase its size by 361% in an attempt to cure its problems was unfair and unreasonable.[128] Justice Blass noted that the majority had emphasized only two of the twelve factors usually applied to determine the reasonableness of an annexation plan[129] and yet had reversed the chancellor in *City of Jackson*, although he had made specific findings on all twelve factors.[130] In the opinion of Justice Blass, the irreconcilable opinions of the majority in *City of Jackson* and *City of Booneville* were indicative of "the unacceptable state of our law with respect to annexation."[131] Ultimately, Justice Blass lamented that chancellors and the supreme court were deciding cases without direction based on personal judgments, not the law.[132]

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[127] *Id.* at 893, 895 (Blass, J., dissenting).

[128] *Id.* at 896-97.

[129] *Id.* at 896 (Blass, J., dissenting). The path of growth and the presence of natural barriers were the two factors addressed by the majority. *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

TORTS

In 1989 the Mississippi Supreme Court rendered several opinions in the area of tort law. This review will briefly focus on seven decisions which are worthy of textual discussion. The other opinions made no change in Mississippi tort law; accordingly, those cases will be treated only in footnotes.[1] These cases dealt with such issues as damages,[2] false imprisonment,[3] joint-and-several liability,[4] malicious prosecution,[5] medical malpractice,[6] negligence,[7] products liability,[8] defamation,[9] gov-

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[1] The following cases were decided in the area of torts and are, as of this writing, not released for publication and subject to revision or withdrawal: Webster v. Mississippi Publisher's Corp., No. 07-58372, slip op. at 17-18 (Miss. Dec. 20, 1989) (suggesting that publishing company's right to control such timely delivery as required in contract made newspaper deliverer "employee" rather than independent contractor); Winters v. Lumley, No. 07-58550, slip op. at 6 (Miss. Sept. 27, 1989) (MISS. CODE ANN. § 19-7-8 (1972) not only authorizes purchase of liability insurance by government entity but also waives entity's immunity up to extent of coverage).

[2] Young v. Robinson, 538 So. 2d 781, 783 (Miss. 1989) (jury instruction requiring reduction of lost future earnings to present value is waived unless specifically requested at lower court level); Eaton v. Gilliland, 537 So. 2d 405, 408 (Miss. 1989) (proof that injured party's damages have been compensated by independent source, separate and apart from tortfeasor, may not be used by tortfeasor to mitigate damages for which he is liable).

[3] Sunshine Jr. Food Stores, Inc. v. Aultman, 546 So. 2d 659, 662-63 (Miss. 1989) (one who merely directs public officer to alleged criminal and does nothing more to procure arrest will not be liable thereafter for false imprisonment).

[4] Golden Flake Snack Foods, Inc. v. Thornton, 548 So. 2d 382, 384 (Miss. 1989) (verdict in favor of local co-defendant and against nonresident corporate defendant and its nonresident driver will not be overturned unless against overwhelming weight of evidence).

[5] Parker v. Mississippi Game & Fish Comm'n, 555 So. 2d 725, 732 (Miss. 1989) (allegation of false arrest in pleadings does not put defendant on notice of claim for malicious prosecution).

[6] Parham v. Moore, 552 So. 2d 121, 123 (Miss. 1989) (statute of limitations in medical malpractice action does not commence until patient discovers or should have discovered cause of action); Robinson v. Hawkins, 541 So. 2d 1048, 1051 (Miss. 1989) (proof that physician's actions fell below minimum medical standard of care constitutes prima facie case of medical malpractice).

[7] Glorioso v. Young Mens Christian Ass'n, 556 So. 2d 293, 295 (Miss. 1989) (in negligence action involving minor, jury must be instructed that minor child between age of seven and fourteen is presumed incapable of contributory negligence); Goodwin v. Derryberry Co., 553 So. 2d 40, 43 (Miss. 1989) (in case involving "open and obvious" hazard, issue of negligence is properly left to jury, where jury is adequately instructed regarding comparative negligence); Mills v. Barnhill, 546 So. 2d 664, 667 (Miss. 1989) (objections to jury instructions in negligence action must be made before case is submitted to jury).

ernmental immunity,[10] jury verdicts,[11] recusal,[12] fraudulent misrepresentation,[13] and warnings.[14]

I. DEFAMATION

In *Staheli v. Smith*,[15] the Mississippi Supreme Court modified the statute of limitations in certain defamation actions.[16] Albert Staheli was a professor of geology at the University of Mississippi[17] who became eligible for tenure in the fall of 1982.[18] Recommendations from supervisors were necessary in order for a faculty member to obtain tenure.[19] Staheli was highly recommended by his department head; how-

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[8] Lambert v. Illinois Cent. Gulf R.R., 547 So. 2d 50, 54 (Miss. 1989) (in order to withstand directed verdict under Federal Safety Appliance Act, claimant must prove that "appliance" failed to operate when used "with due care, in the normal, natural and usual manner").

[9] Meridian Star, Inc. v. Williams, 549 So. 2d 1332, 1336 (in order to withstand summary judgment, public official must prove actual malice).

[10] McFadden v. State, 542 So. 2d 871, 877 (Miss. 1989) (qualified immunity protects only negligent acts of public officials engaged in discretionary decision making); Richardson v. Rankin County School Dist., 540 So. 2d 5, 8 (Miss. 1989) (county may plead governmental immunity to bar action arising from negligent operation of its school bus except to extent of liability permitted by statute).

[11] Wilmoth v. Peaster Tractor Co., 544 So. 2d 1384, 1386 (Miss. 1989) (where record does not reveal that trial testimony was incredible, jury's resolution of facts in favor of one party over other is not, by itself, ground for reversal); Wells Fargo Armored Serv. Corp. v. Turner, 543 So. 2d 154, 158 (where jury verdict is contrary to weight of evidence, it must be set aside); Payne v. Rain Forest Nurseries, Inc., 540 So. 2d 35, 41 (where two jury instructions are in substantive conflict with each other, verdict must be set aside).

[12] Collins v. Dixie Transp., Inc., 543 So. 2d 160, 167 (Miss. 1989) (where judge assumes role of fact witness, he has no alternative but to recuse himself).

[13] Moore v. Simmons, 543 So. 2d 186, 187 (Miss. 1989) (where dealership had no reason to know odometer on vehicle had been rolled, it will not be liable for fraudulent misrepresentation under federal statute imposing liability for failure to disclose mileage).

[14] Wilner v. Mississippi Export Co., 546 So. 2d 678, 682 (Miss. 1989) (where railroad has provided adequate warning at crossing as required by law, it will not be liable to persons who fail to see warning).

[15] 548 So. 2d 1299 (Miss. 1989).

[16] *Staheli*, 548 So. 2d at 1303.

[17] *Id.* at 1300. Albert Staheli began teaching as an Associate Professor of Geology and Geological Engineering in the fall of 1977. *Id.*

[18] *Id.* at 1301. The University of Mississippi faculty handbook stated that new faculty were eligible for tenure after a five-year probationary period. *Id.*

[19] *Id.* In order to obtain tenure, a teacher submitted his portfolio for review by tenured members of his department. *Id.* The tenured members cast an advisory vote, and then the department head made a recommendation. *Id.* If tenure was recommended, five other people, including the dean of the school in which the candidate taught, reviewed his portfolio. *Id.* The ultimate decision to grant tenure rested with the chancellor. *Id.* If

ever, Allie Smith, Dean of the School of Engineering, recommended that Staheli not receive tenure.[20] Staheli was subsequently denied tenure;[21] and a year later, on Smith's recommendation, Staheli was also denied a pay raise.[22] It was not until 1984 that Staheli discovered that his employment file contained derogatory comments made by Smith in the recommendations against tenure and the pay raise.[23] Staheli subsequently filed a defamation action against Smith.[24] However, the lower court granted Smith's motion for summary judgment, stating as one of its reasons that the statute of limitations had run on the defamation action.[25]

In Mississippi, the general rule in a defamation action is that the statute of limitations begins to run on publication of the libelous statement to a third person.[26] The Supreme Court recognized, however, that certain defamation actions are similar to medical malpractice actions

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the chancellor denied tenure, the candidate could appeal to the faculty senate; however, the decision of the senate was only advisory. *Id.*

[20] *Id.* Dean Smith wrote a letter recommending against tenure, which contained strong language and criticisms. *Id.* This letter was read by a third party no later than December 28, 1982. *Id.*

[21] *Id.* Every administrator who reviewed Staheli's file after Smith recommended against tenure also recommended against tenure. *Id.* When tenure was denied by the chancellor, Staheli appealed to the faculty senate. *Id.* Although the faculty senate voted in favor of tenure after reviewing Staheli's file, the chancellor again denied tenure. *Id.*

[22] *Id.* Smith wrote a letter recommending against the pay raise which contained even harsher language than the letter he had written recommending against tenure. *Id.*

[23] *Id.* Staheli learned about the defamation when members of the faculty senate told him his file contained derogatory statements. *Id.* When Staheli asked to see his tenure file, Smith denied his request. *Id.* Staheli did not see the defamatory letters until August 29, 1984, when his tenure file was obtained through discovery. *Id.*

[24] *Id.*

[25] *Id.* Smith filed a motion for summary judgment, giving the following five reasons why summary judgment was appropriate:

1. Staheli was a public figure and offered no clear and convincing evidence of actual malice.
2. The statute of limitations had run.
3. Smith had governmental immunity.
4. The statements were not defamatory as a matter of law.
5. The statements were privileged because Staheli consented to the critical evaluation and to Smith's statements of his evaluation.

Id. at 1302. Summary judgment was granted by the trial court on the basis of the first three reasons. *Id.*

[26] *Id.* (citing Brocato v. Mississippi Publishers Corp., 503 So. 2d 241, 242 (Miss. 1987); Forman v. Mississippi Publishers Corp., 195 Miss. 90, 93, 14 So. 2d 344, 346 (1943); McCarlie v. Atkinson, 77 Miss. 594, 595, 27 So. 641, 641 (1900)). The court noted that the statute of limitations in defamation actions is one year. *Id.* (quoting MISS. CODE ANN. § 15-1-35 (Supp. 1989)).

in which the damage is "inherently undiscoverable."[27] In such malpractice actions, the statute of limitations does not begin to run until the damage is discovered.[28] Because of the similarity, the court held that where the defamation is such that the plaintiff has no way of knowing about, or could not reasonably have discovered, the publication, the statute of limitations does not begin to run until the plaintiff learns of the defamation.[29]

II. Interspousal Immunity

In *Cain v. McKinnon*,[30] the Mississippi Supreme Court declared that the holding of *Burns v. Burns*,[31] which effectively abolished interspousal immunity,[32] applied retroactively.[33] In *Cain*, Brenda Kay Cain filed suit against her ex-husband, Billy Earl McKinnon, charging that while the two were married, McKinnon "savagely and brutally" assaulted and beat her.[34] The suit, filed on August 5, 1987, demanded both actual and punitive damages.[35] When the circuit court dismissed her claim, Cain appealed to the Supreme Court.[36]

On January 13, 1988, while Cain's appeal was pending, the Mississippi Supreme Court decided *Burns*.[37] Applying *Burns* to the *Cain* appeal, the Supreme Court reversed the lower court, holding that the rule abolishing interspousal immunity applied retroactively to all causes of

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[27] *Id.* at 1302. The court listed several states, including California, Illinois, Maryland, Oregon, Texas, Indiana, and Hawaii, which applied the discovery rule in defamation actions. *Id.* at 1303.

[28] *See supra* note 6 (discussing *Parham*).

[29] *Staheli*, 548 So. 2d at 1303. Finding that "the general policies underlying the statute of limitations will not be thwarted," the court adopted the discovery rule, limiting its application to those defamation actions in which the plaintiff did not know of, or could not reasonably have discovered, the defamation. *Id.*

Although the statute of limitations issue was resolved in Staheli's favor, the court ultimately affirmed the decision of the lower court granting summary judgment in favor of Smith. *Id.* at 1306.

[30] 552 So. 2d 91 (Miss. 1989).

[31] 518 So. 2d 1205 (Miss. 1988).

[32] *Burns*, 518 So. 2d at 1211.

[33] *Cain*, 552 So. 2d at 93.

[34] *Id.* at 91. On December 31, 1985, Brenda Kay Cain and Billy Earl McKinnon were married. *Id.* On September 15, 1986, McKinnon assaulted and beat his wife, causing her personal injuries, loss of wages, and other injuries. *Id.* Their marriage ended in divorce on January 29, 1987. *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

action filed after, or pending on, January 13, 1988.[38]

The court recognized the "built-in presumption of retroactivity" in a precedential legal system.[39] Although determining that in certain areas, such as remedies and evidence, retroactivity does not cause unfair results,[40] the court stated that in areas of liability where the new rule was not foreshadowed by prior law, retroactivity would be unjust.[41] However, because Mississippi criminal law has long proscribed McKinnon's actions,[42] the court found that the addition of a civil monetary penalty would not cause injustice.[43]

III. Setoffs

In *Pham v. Welter*,[44] the Mississippi Supreme Court addressed the

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[38] *Id.* at 93.

[39] *Id.* at 92 (quoting Sollem v. Stumes, 465 U.S. 638, 642 (1984)). The court also acknowledged its own practice of applying retroactively decisions overruling common law principles. *Id.* (citing Hall v. Hilburn, 466 So. 2d 856, 875-77 (Miss. 1985)); Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670, 672-73 (Miss. 1983); Tideway Oil Programs, Inc. v. Serio, 431 So. 2d 454, 466 (Miss. 1983)).

[40] *Id.* (citing Jackson v. State, 551 So. 2d 132, 141 (Miss. 1989)); Hall v. Hilburn, 466 So. 2d 856, 876-77 (Miss. 1985); Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670, 672-73; Tideway Oil Programs, Inc. v. Serio, 431 So. 2d 454, 466 (Miss. 1983)). The court stated that in areas such as remedies and evidence, new rules do not create a new standard of conduct; therefore, retroactivity can not be attacked by a reliance argument. *Id.*

[41] *Id.* (citing Hall v. Hilburn, 466 So. 2d 856, 877 (Miss. 1985)). The court recognized that in the area of liability, a new rule does impose new standards of conduct. *Id.* Therefore, retroactive application of such a rule is often unfair. *Id.* In order to avoid this problem, a new rule is often "prospective only." *Id.*; *see* Pruett v. City of Rosedale, 421 So. 2d 1046, 1052 (Miss. 1982) (sovereign immunity abolished prospectively); Knapp v. Stanford, 392 So. 2d 196, 199 (Miss. 1980) (doctrine of sudden emergency abolished prospectively).

[42] *Cain*, 552 So. 2d at 92; *see* Miss. Code Ann. § 97-3-7 (Supp. 1989) (criminal penalty for simple and aggravated assault). The court recognized that assault has long carried with it a criminal penalty. *Cain*, 552 So. 2d at 92. The court also pointed out that there is at least one non-criminal penalty for assault. *Id.* at 92-93; *see* Miss. Code Ann. § 93-5-1 (1972) (habitual cruel and inhuman treatment is ground for divorce); *see also*, Ellzey v. Ellzey, 253 So. 2d 249, 250-51 (Miss. 1971) (single assault, if severe, is ground for divorce).

[43] *Cain*, 552 So. 2d at 93. The court determined that, pre-*Burns*, McKinnon's actions carried a price; after *Burns*, that price was substantially higher. *Id.* However, although retroactive application of the *Burns* rule would affect McKinnon economically, the court concluded, "[N]o doubt our law has a place for economic calculation . . . . But violent conduct toward a fellow human being is not to be traded in the marketplace, in fact or in theory." *Id.* (citing Maryland Casualty Co. v. City of Jackson, 493 So. 2d 955, 960 n.3 (Miss. 1986)). Finding no injustice to McKinnon, the court held that the rule abolishing interspousal immunity applied retroactively. *Id.*

[44] 542 So. 2d 884 (Miss. 1989).

issue of whether a setoff is applicable to diminish the responsibility of an insurer in performing its contractual duty.[45] The litigation in *Pham* arose out of a head-on collision in Biloxi, Mississippi.[46] Tom Minh Pham claimed that the accident occurred because Welter ran a stop sign.[47] Andrew Welter claimed that the accident happened when Pham crossed over the center line and hit Welter's car head on.[48] At trial, both parties produced witnesses who testified to their respective versions of the accident.[49] Medical evidence as to pain and suffering was also presented by both sides.[50] The jury, using a comparative negligence instruction,[51] found that Welter suffered $40,000 in damages and was forty percent negligent and that Pham suffered $30,000 in damages and was sixty percent negligent.[52] On appeal, Welter's insurer claimed that Welter's verdict should have been offset by Pham's verdict.[53]

The Mississippi Supreme Court recognized the general rule requiring that there be one judgment.[54] However, the court found that in the

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[45] *Pham*, 542 So. 2d. at 891.

[46] *Id.* at 886. Andrew Welter filed suit against Tan Minh Pham and Thua Van Tran, owner of the car driven by Pham. *Id.* at 885. Tran counterclaimed for damages to his car. *Id.*

[47] *Id.* at 886.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* at 887. The instruction read in part:

> When you have completed steps 1 and 2 above, complete the following form return same into court:
>
> > We, the jury find Plaintiff/Driver Welter negligent by ____ % and the Defendant/Driver Pham negligent by ____%; we find that the total damages suffered by Welter to be $____, *the total damages suffered by Defendant/Driver Pham to be $____, and the total damages suffered by Defendant/owner Tran to be $____.*

Id. Miss. R. Civ. P. 49(b) authorizes a verdict in the above form. *Id.* at 887 n.2.

[52] *Pham*, 542 So. 2d at 887.

[53] *Id.* State Farm Mutual Automobile Insurance Company, Welter's insurer, argued that Miss. Code Ann. § 11-7-69 (Supp. 1989) required that there be only one judgment instead of the three awards granted by the lower court. *Pham*, 542 So. 2d at 887. The court noted that the insurer's assignment of error "was obviously to protect State Farm to the detriment of Welter." *Id.* Early in the litigation, the attorneys for State Farm abandoned Welter to represent the interests of the insurer. *Id.* at 893. Before making its conclusion, the court stated, "[W]e sternly recommend that the attorneys with an absolute obligation to represent Welter, but instead representing the interest of State Farm Mutual, review Rule 1.7 Conflict of Interest: General Rule, Miss. Code of Professional Conduct . . . ." *Id.*

[54] *Id.* at 891. Section 11-7-69 provides that if the plaintiff's award exceeds an award made to the defendant, the plaintiff is only entitled to recover the excess. Miss. Code

instant case, such a result would be unjust.[55] The court explained that, in the absence of a setoff, Welter would recover $24,000 from Pham's insurer, and Pham would recover $12,000 from Welter's insurer.[56] However, if a setoff were applied, Welter would receive $12,000 from Pham's insurer, and Pham would receive nothing.[57] The court recognized that a setoff would diminish both Pham's and Welter's recovery, while their insurance companies would experience a windfall.[58] Because the purpose of liability insurance is to relieve the insured of the cost of his negligence, the court held that a setoff could not be used to diminish the responsibility of the insurer.[59]

IV. Comparative Negligence

In the case of *McDaniel v. Ritter*,[60] the Mississippi Supreme Court held that the appropriate defense to be raised when the plaintiff has voluntarily exposed himself to a potential risk of harm is comparative negligence, not assumption of risk.[61]

Jack Ritter was killed when the airplane in which he was riding crashed after becoming weighted down under severe icing conditions.[62] His spouse and minor children brought an action against the pilot/owner of the airplane and others for the wrongful death of Ritter.[63] The jury returned a verdict for the defendants, but the trial judge granted a new trial after concluding that he had erred in submitting the case to the jury on assumption of risk.[64] The case came before the

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Ann. § 11-7-69 (Supp. 1989).

[55] *Pham*, 542 So. 2d at 891. The court posed the following question: "[W]hy should State Farm, Welter's liability carrier, enjoy a windfall and pay nothing for Pham's damages by a reduction of Welter's damages?" *Id.* In answer to its question, the court stated that such a procedure is manifestly unfair. *Id.*; *see* Stuyvesant Ins. Co. v. Bournazian, 342 So. 2d 471, 474 (Fla. 1976) (setoff applies only between uninsured parties).

[56] *Pham*, 542 So. 2d at 892.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 892-93 (quoting Jess v. Herrmann, 26 Cal. 3d 131, 161 Cal. Rptr. 87, 604 P.2d 208, 213 (1979)).

[60] 556 So. 2d 303 (1989).

[61] *McDaniel*, 556 So. 2d at 316. Although a number of procedural issues were raised on appeal, plaintiffs/appellees sought to limit review to the sole question of whether the trial judge erred in submitting the case to the jury on the issue of assumption of risk. *Id.* at 306.

[62] *Id.* at 305.

[63] *Id.* The gravamen of the plaintiff's complaint was that the pilot negligently departed from Springfield, Illinois, without first obtaining a full weather briefing. *Id.*

[64] *Id.* at 306.

Mississippi Supreme Court by interlocutory appeal.[65]

The supreme court found that the trial court had erred in submitting the case to the jury on the issue of assumption of risk, since the evidence failed to establish that Ritter knew, appreciated, and affirmatively chose to encounter the risk of flying into unknown weather conditions.[66] Accordingly, the court reasoned that the evidence at trial only raised an issue regarding Ritter's negligence.[67]

The real significance of this decision actually lies in the separate opinion of Justice Sullivan. There, Justice Sullivan traced the court's long trend away from applying assumption of risk and stated outright that the court is merely waiting for the right case in which to abolish the doctrine altogether.[68] According to Justice Sullivan, the court will likely merge the doctrines of assumption of risk and comparative negligence and title the new standard "comparative fault."[69] Under the new standard, a plaintiff's negligence would reduce, but not bar, his recovery unless his negligence alone caused his injury.[70]

V. Premises Liability

In 1989 the Mississippi Supreme Court also addressed the issue of premises liability on several occasions.[71] However, the only decision affecting current Mississippi law is the case of *Clark v. Moore Memorial United Methodist Church.*[72]

In *Clark*, plaintiff, the pastor's wife, filed an action against Moore Memorial after slipping and falling on the wood floor in the fellowship house while leaving Sunday School class.[73] Moore Memorial moved for partial summary judgment on the issue of plaintiff's status at the time

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[65] *Id.*

[66] *Id.* at 316. Defendants/appellants contended that Ritter assumed the risk by accompanying the pilot into weather which he, as a pilot himself, must have known to be dangerous. *Id.* at 315.

[67] *Id.* at 315-16.

[68] *Id.* at 320. In his opinion, Justice Sullivan indicated that assumption of risk is a confusing, complicated theory and cited a number of Mississippi opinions in which the court has struggled, unsuccessfully, to maintain a distinction between assumption of risk and contributory negligence. *Id.* at 519 (citing Shurley v. Hoskins, 271 So. 2d 439, 443-44 (Miss. 1973); White v. Mississippi Power & Light Co., 196 So. 2d 343, 351-53 (Miss. 1967); Crouch v. Mississippi Power & Light Co., 193 So. 2d 144, 146-47 (Miss. 1966)).

[69] *Id.* at 319-20.

[70] *Id.*

[71] *See* cases cited *supra* note 3.

[72] 538 So. 2d 760 (Miss. 1989).

[73] *Clark*, 538 So. 2d at 760.

of her fall.[74] The trial court concluded that plaintiff was a "licensee" and dismissed the suit since plaintiff failed to prove willful or wanton conduct on the part of the church.[75]

On appeal, the Mississippi Supreme Court distinguished a "public invitee" from a licensee and concluded that church members, while attending church functions or services, fall within the category of "public invitee" since churches expressly and implicitly invite members to attend their services.[76] As an invitor, Moore Memorial was obligated to provide plaintiff with a reasonably safe place to worship.[77] Since the condition of the wood floor was a genuine issue of fact, the court reversed and remanded.[78]

VI. Damages

In 1989, the Mississippi Supreme Court addressed for the first time, the issue of whether a plaintiff has an absolute right to reject an additur or remittitur and have a new trial on damages or whether he must appeal the trial court's decision as an abuse of discretion. In the case of *Odom v. Parker*,[79] Sherri Leigh Odom, by and through her mother, and Mrs. Odom, individually, sued Clint Parker for injuries sustained when Parker ran his automobile into the rear of the car in which they were riding.[80] Following trial, the jury returned a verdict of $1,515.49 for Mrs. Odom and no damages for Sherri.[81] The trial judge overruled Odom's motion for a new trial and ordered an additur in the amount of $983.51 to be granted to Sherri.[82] The Odoms appealed.[83]

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[74] *Id.* at 761.

[75] *Id.* at 762.

[76] *Id.* at 764.

[77] *Id.*

[78] *Id.*

[79] 547 So. 2d 1155 (Miss. 1989).

[80] *Odom*, 547 So. 2d at 1156.

[81] *Id.*

[82] *Id.* Since liability was clear, Parker's insurance carrier had paid Mrs. Odom $2,500 on the claim to be credited against any judgment rendered against Parker. *Id.* Concluding that a total award of $2,500 was fair and reasonable, the trial judge ordered that $983.51 be added to the $1,516.49 jury verdict. *Id.* Accordingly, the $2,500 paid in advance of trial completely satisfied the judgment. *Id.*

[83] *Id.*

The Mississippi Supreme Court reversed and remanded, since a plaintiff, as a defendant, should not be required to appeal for relief but should be given the opportunity of having a new trial on damages.[84]

Dana Dew
Katharine Malley

[84] *Id.* at 1158. The Mississippi Supreme Court has repeatedly recognized that a defendant in the given situation may (1) refuse to accept an additur or remittitur and have the case retried on damages, (2) appeal on the basis that the trial judge abused his discretion, or (3) accept the additur or remittitur and pay the judgment. *Id.* In *Odom*, the court recognized for the first time that there is no reason to distinguish between the right of a defendant and the plaintiff in rejecting an additur or remittitur and requesting a new trial on damages. *Id.* As the court noted, "[w]hen either the circuit judge or this Court directs an additur or remittitur, this is usurping the function of a jury, and it should not be binding unless accepted by both parties." *Id.*

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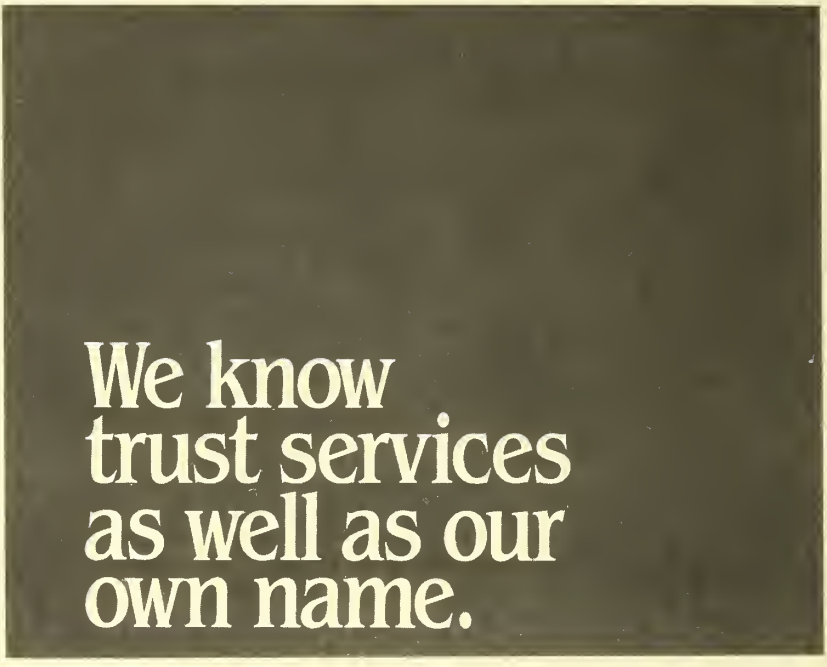

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